# THE KING'S REPUBLICS

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H. J. SCHLOSBERG

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*WITH A FOREWORD BY*

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# FOREWORD

By General the Hon. J. B. M. HERTZOG, LL.D.

The spiritual intercourse which we have with an author while following his views, not only serves as a correction to our own, but while familiarising us with the many-sidedness of truth, cultivates in us that spirit of tolerance without which Truth will not unveil her face unto us.

If the questions discussed in this book primarily concern the members of the British Commonwealth, they are, nevertheless, more than mere Commonwealth problems; they are world questions. Through the League of Nations every member of the Commonwealth, and thereby the Commonwealth itself, stands related to the world, and every foreign State feels itself interested, if not concerned, in the constitutional questions affecting that Commonwealth, whether in respect of its members *inter se*, or in relation to the world at large.

The author has shown the greatest courage in grappling and dealing with these questions and in giving independent expression to his individual judgment. Whether we agree with his views or not, we must appreciate their value as an important contribution to our constitutional literature. No matter to what political school or party we may belong, every earnest attempt to make clear and to enlighten on matters concerning our national status and our relationship to the rest of the world, must be welcomed by South Africans in a spirit of national appreciation.

Every such attempt, in so far as it is made in a spirit of loyal endeavour in search of truth, is a genuine contribution to the advancement of Commonwealth co-operation and goodwill. This book should, therefore, be welcomed in every Dominion, and by all students of constitutional and international law.

# PREFACE.

Recent political controversies over the effect of the Inter-Imperial Relations Report, 1926, especially on the question of the neutrality of the Dominions in a war in which Great Britain might be engaged, and on the questions of the independence of the Dominions and their secession from the Empire, tempt me to offer this little book to the public. I have not attempted an exposition of the constitutional law of the British Empire; better pens than mine have done that. Instead I have presented an argument, I hope a fairly connected argument, to show that the Dominions are sovereign and independent States; and I have endeavoured to indicate the political principles which I think ought to govern the relationship of the various States of the British Commonwealth.

The views which will be found in the pages that follow are the views of an average Nationalist. But despite the assertions of political antagonists in South Africa, Canada, India, and even in Australia, the average Nationalist not only is not anti-British or anti-Imperialist, but is both an Imperialist in the sense that he wishes the British Empire to continue and to grow in strength and prosperity, and pro-British in the sense that he believes that Britain is a truer friend of the Dominions than any other country, even in similar

favourable circumstances, could ever be. No Nationalist can fail to recognise that the British Empire has meant and means the rise of its constituent parts to full autonomy through gradual steps of constitutional growth and that the British Commonwealth will not tolerate the suppression of one people for the benefit of another, even although it be the people of Great Britain herself. But though the political creed of a Nationalist must be the interests of his own country first, he has come to realise the value of being part of an Empire.

If this book has a special aim of its own which I have not perceived in any other books on the subject, however many might have been written on Imperial politics, and if the manner of treatment does not follow the well-established models of other writers, yet I cannot underrate the debt I owe to the labours of authors like Jenkyns, Lowell, Duncan Hall, Nathan, H. A. Smith, Kenny, and that greatest of all writers on the constitutional problems of the British Empire, Sir Arthur Berriedale Keith. This book, written as it was from notes I commenced whilst a student in London, must necessarily involve many quotations from authors and statesmen. Wherever possible I have acknowledged my indebtedness, and acknowledged it gladly. If, however, there is in this respect any omission, I apologise to the author concerned with the assurance that the omission is accidental and will be rectified when possible.

H. J. S.

Corporation Buildings,
Johannesburg.
*Felruary*, 1929.

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# INTRODUCTION.

> We come with an earnest desire to render what assistance we can in the solution of the problems to be faced.—*Mr. Cosgrave, on behalf of the Irish Free State at the* 1923 *Imperial Conference.*

# INTRODUCTION.

## § 1. Disraeli, Chamberlain, and Hertzog.

Disraeli is a name which sounds even now like the call of a trumpet. To him Empire meant something real and organised; a gigantic State of tariffs and codes and securities. "I cannot conceive," he once declared (*a*), "how our distant Colonies can have their affairs administered except by self-government. But self-government, in my opinion, when it was conceded, ought to have been conceded as part of a great policy of Imperial consolidation. It ought to have been accompanied by an Imperial tariff, by securities for the people of England for the enjoyment of the unappropriated lands which belonged to the Sovereign as their trustee, and by a military code which should have precisely defined the means and the responsibilities by which the Colonies should be defended, and by which, if necessary, this country shall call for aid from the Colonies themselves." This would have been a real Empire, and Britain a real "presiding republick." Mussolini would have liked Disraeli's Empire.

Chamberlain dreamed of Federation. "It has sometimes struck me that it might be feasible to create a great council of the Empire to which the Colonies would send representative plenipotentiaries. If such a council were to be created it would at once assume an immense importance, and it is perfectly evident that it might develop into something still greater. It might slowly grow to that Federal Council to which we must always look forward as our ultimate ideal" (*b*). Chamberlain's vision of a Federation was a mirage as empty, a dream as impossible as ever mocked an able mind.

(*a*) *Speech*, June 24, 1872.
(*b*) *Colonial Conference Proceedings*, 1897.

On May 4, 1917, Hertzog, who delivers his speeches from manuscript, said: "Side by side with the British people, but by no means under them, we owe allegiance to the King of England as being also *our* sovereign lord. We are independent of Great Britain as a country, as a Dominion; but on the King of England as our sovereign lord, we are dependent." In 1926, at the same little University town of Stellenbosch, before his departure for the Imperial Conference, he used identical words. It might have been the same manuscript.

A few months later he brought back the declaration of the Conference and again read from manuscript. "Great Britain and the Dominions are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations" (*c*). After the General's speech was concluded and while the British National Anthem was being sung, a bearded Boer from the backveld was heard (*d*) to exclaim: "I have never stood up to that song before, but to-day I take off my hat to it."

And Hertzog, thinking perhaps of Disraeli and Chamberlain, might possibly have been muttering the words of Joubert (*e*): "Forms of government become established of themselves. They shape themselves; they are not created. We may give them strength and consistency, but we cannot call them into being. Let us rest assured that the form of government can never be a matter of choice. It is almost always a matter of necessity."

(*c*) *Inter-Imperial Relations Report*, par. II.; General Hertzog, *Speech*, Pretoria, December 20, 1926.

(*d*) The author was present.

(*e*) *Pensées*, No. 197.

## § 2. Conceptions of Empire.

In 1775, when Edmund Burke pleaded for conciliation with the Colonies, he exclaimed: "Perhaps, Sir, I am mistaken in my idea of an Empire. But my idea of it is this: that an Empire is the aggregate of many States under one common head; whether this head be a monarch or a presiding republick."

Burke was a long way ahead of a revenue-producing, plantation-Empire. In the words of the Irish orator may be seen two distinct conceptions of Empire. In the first place, there is the conception of a Group Unit, *the aggregate of many States under a Monarch*, each State surrendering its sovereignty to a central authority and becoming subordinate to it. This is what General Hertzog calls the half-way house to Imperial Federation. In such an organisation sovereignty would be exercised by a Supreme Council of Empire. In its international side the Empire would then be termed a Federation, though it would probably be without the formal Federal constitution possessed by the United States of America. In 1905 this idea reached its nearest approach to realisation when a permanent commission as an auxiliary to the Imperial Conference, a kind of Council of Empire, was proposed. To this proposal Canada objected on the ground that such a permanent commission, endowed with a continuous life, might eventually come to be regarded as an encroachment upon the full measure of autonomous legislative and administrative power then enjoyed by all the Dominions. Federation was regarded as impossible of attainment because the life-blood of Dominion politics was that they each of them were, and that they each of them intended to remain, master in their own household. General Hertzog called this Group Unit idea the half-way house to Imperial Federation, because, once it was adopted, it would have to be perfected into a formal Federal constitution.

The second conception discernible in Burke's words is that of *the aggregate of many States under a presiding republick*. In such an organisation, a single State, probably the strongest,

such as Great Britain, would direct, control and command. No other State in the Empire would possess any sovereignty or exercise any authority or right in external affairs, with the exception, perhaps, of a right of advice, which might or might not be acted upon. All the great matters of Imperial importance, all external affairs—these would be transacted by the Imperial Government, legally able to override or to ignore the wishes of the non-sovereign States of the Empire. This was the nature of the original organisation of the British Empire, and this organisation existed until, it may be said, the signing of the Peace Treaty by the Dominions in 1919.

For one hundred and fifty years statesmen have toyed with these two conceptions of Empire; shrunk from one conception; advanced towards the other; uttered eloquent orations and subscribed to noble ideals. But each conception was in turn rejected—the first in 1905; the second, definitely, in 1926—the first, because the Dominions feared it would mean an encroachment upon the liberty which they already possessed; the second, because the Dominions considered that under it they would never possess liberty enough.

In 1926, in Conference assembled, the chosen representatives of nations undreamed of by Burke rejected the conception of *an aggregate of many States* in whatever form, and thus put an end to an Empire in the only true sense of the word (*f*). For the Empire to-day is not an aggregate, but an association, of States; and the only element of Burke's conception of Empire that remains is the common Head. Where there are free sovereign States associated together without any element of compulsion, the idea of Empire, of control or superiority, is excluded. We still use the phrase to denote all the territories of the Crown, for it is a fine phrase, with traditions and memories and greatness; but it has outgrown its true meaning; its traditions and greatness are transferred to what is now

(*f*) Webster defines *Empire* as "a State characterised by a supremacy of a stronger over the weaker members of a confederacy, or over its confederates, conquests and colonies, as . . . the Roman *Empire* . . . the British *Empire*." (*New International Dictionary*.)

a Britannic Alliance. In the people of the Britannic States something of the traditions will live on; while the greatness will grow greater so long as the traditions are honoured.

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## § 3. Classification.

On January 1, 1929, the British Empire comprised (*g*):—

(1) *A group of seven autonomous States* referred to as the British Commonwealth of Nations, but more correctly designated Britannic States, consisting of the United Kingdom of Great Britain and (Northern) Ireland, the Dominions of Canada, Newfoundland and New Zealand, the Union of South Africa, the Commonwealth of Australia, and the Irish Free State. Each of these States possesses equal membership of the Imperial Conference; and each, except Newfoundland, possesses membership of the League of Nations. Great Britain and Canada are members of the Council of the League.

(2) *India,* possessing membership of the League of Nations and having representation at the Imperial Conference. At present under a diarchical form of government, she is almost ready to receive Responsible Government, when she will have a status equal to that of the other Britannic States.

(3) Two *self-governing Colonies,* Malta and Southern Rhodesia, with a wide, but not unrestricted, autonomy, and not entitled to representation at the Imperial Conference.

(4) *Crown Colonies,* not possessing Responsible Government and in which the executive is controlled by the British Government through the Secretary of State for the Colonies. Their legislatures may be entirely independent of the executive, as in Bahamas, Bermudas and Barbados, but are subject to control either because there is an official majority or the Governor alone constituted the legislature.

(*g*) Cf. classification by Keith in *Encyclopædia Britannica,* New Vol. 1, p. 440, 13th Ed.

(5) *Protectorates,* such as Uganda and Nigeria.

(6) *Protected States,* such as Zanzibar and Sarawak.

(7) *Mandated Territories* held under mandates granted by the League of Nations.

(8) *Dependencies,* such as Papua, *attached to a Dominion* and administered by them on Crown Colony lines.

The inhabitants of all these territories owe, in some form or another, allegiance to His Britannic Majesty. But no Cæsar or Charlemagne ever presided over a dominion so peculiar, over persons so different in race, religion, manners or customs. Some of these races are bound to each other by the ties of liberty; others by considerations both moral as well as material. Over all these persons there floats a common flag and in all these territories there is spoken a common language —the flag and the language of a Power which, in the imperishable words of Daniel Webster, the greatest of American orators, has "dotted the surface of the whole globe with her possessions and military posts, whose morning drum-beat, following the sun in his course and keeping pace with the hours, circles the earth with one continuous and unbroken strain of the martial airs of England."

These possessions and military posts, these great Dominions, have been kept together for many years, not by force, but by a genius which has never yet been fully appreciated by the British themselves and never yet understood by the rest of the world. What exactly this spirit of cohesion is, may possibly be found in the pages that follow. But it will not be found in a constitution; for the British Empire has no constitution, and it has repeatedly declined to create for itself anything in the nature of a constitution (*h*). For the governance of all the widespread possessions of the Crown there are only "a

(*h*) Mr. Meighen, Prime Minister of Canada, on September 27, 1924, expressed the prevailing sentiment on the question of a constitution for the British Empire: "The indefinable relations which in the past have made for the strength of the British Empire should be allowed to continue. It would be much safer to let relations develop along the lines that have made the British Empire what it is to-day."

varied and seemingly confused medley of statutes, charters, orders in council, conventions, traditions and understandings" (*i*). In these conventions and understandings, chiefly, will be found that cohesive spirit which has made the Empire so compact and solid in times of crises. They are "the *spirit* of the English constitution, which, infused through the mighty mass, pervades, feeds, unites, invigorates, every part of the Empire, even down to the minutest member" (*k*). This spirit of the ancient constitution of England nourished the growth of the various parts of the Empire like a health-giving beneficent sun until some of them grew into adolescence and transformed the whole. There is something in this spirit of the constitution that defies and overcomes difficulties, and, in the course of time, conducts people to a higher level of efficieney and prosperity (*l*). It has tended and moulded the various institutions of the Empire into circumstantial form. It has given the Dominions international rights and independence, for, by its conventions and understandings it has transformed legal limitations into fiction and denuded them of force and reality. It has elevated the office of the King into the most illustrious and august ever known. But in doing all this it has put an end to the Empire in the only true sense of that word, and created another Empire in the only sense in which it could ever continue.

(*i*) Sir Robert Borden, *Canadian Constitutional Studies,* p. 143.
(*k*) Burke, *Speech, Conciliation with the Colonies,* 1775.
(*l*) S. Sastri, *Speech,* Johannesburg, May 28, 1928.

# Part I.

# STATUS.

The very definition of independence is, not being subject wholly or in part to any control by an external authority.—*Professor Lowell, Foreign Affairs, Vol.* 5, p. 386.

# CHAPTER I.

## GROWTH AND TRANSITION.

THE status of the Dominions will be understood more clearly if their constitutional development is traced from their position of total subordination to Great Britain to their present position of sovereign independence (*a*). The process of development that has produced the present situation of independence has been continuous. It is better traced in the case of Canada than elsewhere because there the process began earliest, and whatever was achieved in her case has been adopted later elsewhere.

The early Colonies on the eastern sea-board of America had in most cases a Governor appointed by the Crown with an executive of officials responsible to him, and, as time went on and communication grew easier, the Governor came more and more under the direction of the British Government at home (*b*).

The rudiments of the Colonial Office are to be found as far back as the year 1634 in the form of a Committee of the Privy Council charged with the administration of the "Plantations." From 1634 until the Declaration of American Independence in 1776, this Colonial Office in expanding degree did control, but subject always to a considerable amount of local self-government, the Colonies of the earliest stage (*b*).

During the long wars of the eighteenth century there were acquired by conquest vast territories in India, Canada and South Africa, but these territories were not subjected to autocratic government in the way that the Colonies of France and Spain were subjected. They were placed under a form of

(*a*) See Nathan, *Empire Government*, p. 22.
(*b*) See Prof. Kenny, 2 *Cambridge Law Journal*, 1926, p. 157.

Crown Colony Government, and the inhabitants were allowed the enjoyment of the legal systems which had obtained at the time of conquest (*b*).

Towards the end of the eighteenth century and in the early part of the nineteenth century the overflow of the increase in population in England peopled the open spaces of Australia and New Zealand, the prairies of Canada, and the South African veld. Canada, at this time, was not one Colony, but two. There was the English-speaking Colony of Upper Canada, which we now call Ontario, and French-speaking Quebec. The friction between these two Colonies marks the beginning of Responsible Government. Queen Victoria's first speech to her Parliament in 1837 commended to its serious consideration the condition of Lower Canada. An armed rebellion broke out within a few weeks (*c*).

Public opinion in England was against the retention of the Colonies. The statesmen of Britain placed little value upon them. "Great would be the advantage of an amicable separation," said Sir William Molesworth. The great Lord Brougham declared "Canada to be altogether unworthy of our making sacrifices to retain it. From a national point of view I really hold these Colonies to be worth nothing. A separation, sooner or later, is inevitable" (*d*).

While these words were being uttered, Lord Durham, of Reform Bill fame, was sent out to Canada, and he took with him two brilliant but comparatively unknown young men, Charles Buller and Edward Wakefield. It is said that the

(*b*) See Prof. Kenny, 2 *Cambridge Law Journal,* 1926, p. 157.

(*c*) Kenny, *supra;* Lowell, *Foreign Affairs,* Vol. 5, p. 380.

(*d*) London *Times,* January 18, 1838. On April 14, 1837, Lord John Russell, in the House of Commons as Secretary of State for the Colonies, when referring to the Canadian demand for "an Executive Council which shall be responsible to them, and not to the Government or Crown of Great Britain," had said: "We consider that these demands are inconsistent with the relations between a Colony and the Mother Country, and that it would be better to say at once, 'Let the two countries separate,' than for us to pretend to govern the Colony afterwards."

former wrote and the latter revised the manuscript which was handed to Lord Durham and later became known as the Durham Report.

This Report urged that Great Britain must "confine within much narrower bounds the interference of the Imperial authorities" in the affairs of the Colonies, must strengthen the control of the Colonists themselves over their local government, and must allow that government to be carried on by persons in whom the Parliamentary representatives of the Colonists themselves have confidence. In other words, the Colonies must be given not only representative institutions, but also responsible government organised according to the English model of party government.

The new system worked like a charm in allaying the disturbances and jealousies of political life in Canada and passed quickly to all the other great Colonies, by the end of the nineteenth century creating no less than five independent governments within the British Empire—Canada, Newfoundland, Australia, New Zealand and the Cape. Its latest application was to the Irish Free State in 1922, and it is now being granted to the Empire of India (*e*).

Up to the Peace Treaty of 1919, the status of the Dominions, as the Responsible Government Colonies were called from 1867 when the Dominion of Canada received its constitution, was that between absolute subordination and sovereign independence. It was a great deal above the former and a long way from the latter. But during this period great changes were taking place in the constitutional relations of the Dominions with the Mother Country. The Dominions kept on asking from time to time for a greater degree of autonomy, and this was always granted when the demand appeared to be serious. The practical situation was that the Dominions could obtain

(*e*) For most of the remarks in this chapter up to this point the author is indebted to an article by Prof. Kenny, 2 *Cambridge Law Journal*, 1926, pp. 157 *et seq.*

any amount of autonomy they earnestly desired. It was perfectly understood that neither the Cabinet nor the Parliament at Westminster would resist such a demand, and hence the nature of the connection with the United Kingdom would be determined by the progressive wishes of the Dominions themselves.

Whenever any Dominion obtained a concession or right, that concession was automatically extended to all the other Dominions. It is important to understand that this extension was based not so much on the *fact* that a precedent had been created, but on the *principle* of the equality of status of the Dominions. Whatever tended to raise the status of one Dominion operated in an equal degree to raise the status of each of the other Dominions. This equality of status of all the Dominions was rigidly and jealously maintained. It was in each Dominion held to be a cardinal principle. But it did not apply to Great Britain. Her status, definitely, was higher than that of a Dominion.

The Peace Treaty of 1919 marked the beginning of the *new status*, that is, of a status equal to that of Great Britain. The rise in status, like economic development, is a process of growth. Originally a savage wilderness, each Dominion had become a populous, thriving community. The Great War gave an impetus to their constitutional and economic development. The Dominions emerged from that War wealthier, more independent economically, than they had ever been before. At the Peace Conference they considered themselves of an international status at least equal to the minor belligerent States. Depleted as were the resources of the greater Powers, it became more difficult for them to resist the demands for recognition of these vigorous young communities beyond the seas, who had contributed so much to the brunt of fighting in every arena of the world.

The Peace Treaty was signed by Great Britain generally for the British Empire and by the Dominions specifically for themselves. The signature for the British Empire represented

the idea of Imperial Federation, of a super-State imposing its will on each and every part of the British Empire; the separate signatures for the Dominions marked the beginning of a new idea, the absolute sovereignty and independence of each Dominion. It marked the end of the period of the absolute unity of the British Empire (*f*).

The period from 1919 to 1926, from the year of the signing of the Peace Treaty by the Dominions to the year of the publication of the Inter-Imperial Relations Report, was a period of transition, a transition from Dominion status to independent status. The Dominions had ceased to be Colonies in any sense of the word; they were transition States. Transition States must be described, rather than defined. There is a celebrated passage in Oppenheim's great work on international law, written before the Inter-Imperial Relations Report, which aptly describes this last stage of transition (*g*):—

"Formerly the position of self-governing Dominions, such as Canada, Newfoundland, Australia, New Zealand and South Africa, did not in international law present any difficulties. They had no international position whatever, because they were, from the point of view of international law, mere colonial portions of the mother country. It did not matter that some of them, as, for example, Canada and Australia, flew as their own flag the modified flag of the mother country, or that they had their own coinage, their own postage stamps or the like. Nor did they become subjects of international law (although the position was somewhat anomalous) when they were admitted, side by side with the mother country, as parties to the administrative unions, such as the Universal Postal Union. Even when they were empowered by the mother country to enter into certain treaty arrangements of minor importance with foreign States, they still did not thereby become subjects of international law, but simply exercised for the matters in question the treaty-making power of

(*f*) See Keith, *Encyclopædia Britannica*, 13th Ed. New Vol. I. p. 442.
(*g*) *International Law*, 3rd Ed. Vol. I. secs. 94a and 94b.

the mother country which had been to that extent delegated to them.

"But the position of self-governing Dominions underwent a fundamental change at the end of the World War. Canada, Australia, New Zealand, South Africa, and also India, were not only separately represented within the British Empire delegation at the Peace Conference, but also became, side by side with Great Britain, original members of the League of Nations. Separately represented in the Assembly of the League, they may, of course, vote there independently of Great Britain. Now the League of Nations is not a mere administrative union like the Universal Postal Union, but the organised family of Nations. Without doubt, therefore, the admission of these four self-governing Dominions, and of India, to membership, gives them a position in international law. But the place of self-governing Dominions within the family of Nations at present defies exact definition, since they enjoy a special position corresponding to their special status within the British Empire as 'free communities, independent as regards all their own affairs, and partners in those which concern the Empire at large.' Moreover, just as, in attaining to that position, they have silently worked changes, far-reaching but incapable of precise definition, in the Constitution of the Empire, so that the written law inaccurately represents the actual situation, in a similar way they have taken a place within the family of Nations, which is none the less real for being hard to reconcile with precedent. Furthermore, they will certainly consolidate the positions which they have won, both within the Empire and within the family of Nations."

To-day the Dominions have arrived at the stage of perfect equality of status with Great Britain. In 1884 that far-sighted statesman, Mr. W. E. Forster, said of the Colonies: "As their population and their power increase, it will daily become more clear that the ultimate terms of our connection with them must (in some manner or other) be framed on the principle of perfect equality." No large community of free

and intelligent men would long feel contented with a political system which placed them, because it placed their country, in a position of inferiority to their neighbours (*h*). Now that the Dominions have reached the stage of perfect equality with Great Britain, they no longer feel discontented. "We are satisfied," said Mr. Roos, the brilliant leader of the Nationalist Party in the Transvaal.

(*h*) Lord Durham, *Report*.

## CHAPTER II.

### INDEPENDENCE.

"The marks of an independent State," wrote Professor Hall (*a*) in his famous book on international law, "are, that the community constituting it is permanently established for a political end; that it possesses a defined territory; and that it is independent of external control. . . . So soon as a society can point to the necessary marks, and indicates its intention of conforming to law, it enters of right into the family of States, and must be treated according to law. The simple facts that a community in its collective capacity exercises undisputed and exclusive control over all persons and things within the territory occupied by it, that it regulates its external conduct independently of the will of any other community, and in conformity with the dictates of international law, and, finally, that it gives reason to expect that its existence will be permanent, are sufficient to render it a person in law. . . . A State in its perfect form has, in virtue of its independence, complete liberty of action, subject to law, in its relation with other States. This applies to States linked by a personal union. A personal union exists, as in the instance of Great Britain and Hanover from 1714 to 1837, when two States, distinct in every respect, are ruled by the same prince; and they are properly regarded as wholly independent States who merely happen to employ the same agent for a particular class of purposes, and who are in no way bound by or responsible for each other's acts. . . . But it does not apply to members of a federal State, because the distinguishing marks of a federal State upon its international side consist in the existence

(*a*) Hall, *International Law*, 8th Ed. pp. 16—24.

of a central government to which the conduct of the external relations is confided" (*b*).

The Dominions in every way conform to the requirements of independent States as laid down in this authoritative statement. They are permanently established for a political end; they each possess a defined territory; they are independent of external control; they may be expected to exist for an indefinite period of time. And it does not matter that some functions are carried on for the Dominions by Great Britain, such as legislation by the Imperial Parliament for the whole Empire or communication with foreign Powers through the Secretary of State for the Dominions and the British ambassador. The exercise of these functions by delegation, "is a matter of convenience, of consent, of mutual agreement, and not evidence of subordination on the part of one partner in the Empire to another" (*c*). For States may curtail their external or international functions by an alliance, or by a treaty of protection, or by an understanding to conform to a certain course of action, as in the case of the Britannic States, without thereby ceasing to be sovereign (*d*).

According to international law, therefore, the Dominions are independent because they are at liberty, if they so wish, to exercise every function of national or international right. It remains to be shown how their independence has been recognised. Once independence is recognised, such recognition is absolute and irrevocable. It marks the beginning of a State in international law. Although the right to be treated as a State is independent of recognition, recognition is the necessary evidence that the right has been acquired.

Professor Hall states the position with customary clarity: "The commencement of a State dates from its recognition by

(*b*) Cf. United States of America, and the German Empire, 1871 Constitution.

(*c*) Mr. Amery, *British Hansard,* June 29, 1927; General Hertzog, *Union Hansard,* March 8, 1928.

(*d*) On this point see Huber, *Heed. Regts,* Bk. 4, ch. 27; Bodin, *de la Republique,* Bk. 1, ch. 8; Grotius, *de jure Belli ac Pacis,* 1. 3. 7; Voet, 48. 4. 5.

other Powers; that is to say, from the time at which they accredit ministers to it, or conclude treaties with it, or in some other way enter into such relations with it as exist between States alone. For though no State has a right to withhold recognition when it has been earned, States must be allowed to judge for themselves whether a community claiming to be recognised does really possess all the necessary marks, and especially whether it is likely to live. . . .

"The admission of a State to membership of the League of Nations carries with it *de jure* recognition by all other members (*e*). Poland and Czecho-Slovakia received recognition by being admitted as parties to the Treaty of Versailles in 1919. . . . New States generally come into existence by breaking off from an actually existing State. Recognition is accorded either by the parent country or by a third Power. Recognition by a parent State, by implying an abandonment of all pretensions over a community, is more conclusive evidence of independence than recognition by a third Power, and it removes all doubts from the minds of other governments as to the propriety of recognition by themselves. But it is not a gift of independence; it is only an acknowledgment that the claim made by the community to have definitely established its independence, and consequently to be in possession of certain rights, is well founded" (*f*).

From this statement it appears that the Dominions received recognition as independent States by being admitted as parties to the Treaty of Versailles in 1919. If this is so, and there seems to be no valid argument against this contention, General Hertzog was right when he said that the Dominions, at the time of being admitted to the League of Nations, were entitled to the right of neutrality when Great Britain went to war. Admission to the League of Nations also was recognition of independence. The appointment of ambassadors by Canada

(*e*) Hall cites, in support of this statement, J. Concke, *Revue de droit international et de legislation comparée*, 3e ser. 1921, ii. 320; and G. Scelle, *Revue generale de droit international public*, 3e ser. 1921, iii. 122.

(*f*) Hall, *International Law*, 8th Ed. p. 104.

and the Irish Free State was recognition of independence. Finally, the declaration of the Imperial Conference in 1926 was an abandonment by Great Britain of all pretensions over the Dominions and an outright declaration to the world of their independence.

This declaration by the Imperial Conference differed from all former expressions in respect of the status and liberty of the Dominions by the publicity deliberately given to it, as well as by the authority with which it had been made, and especially in its absolute renunciation on behalf of Great Britain in favour of the Dominions of all control over Dominion affairs of whatever nature. It was not a mere opportunistic declaration granting the Dominions this right or that right as required by circumstances, reserving to Great Britain all rights and capacities not yet granted to the Dominions, but it was a positive, complete equalisation of national rights and national liberty without any reservation, openly declared and accepted by the qualified representatives of Great Britain and the Dominions (*g*).

This declaration has been confirmed by the Government of Great Britain and sanctioned by His Majesty the King of the Britannic States. It has been stored in the Congressional Record of the United States of America "as perhaps the most important document of its kind ever promulgated by the English-speaking race." It has been acted upon in the appointment of diplomatic representatives by Canada. It has been acknowledged and accepted by the public opinion of the whole world. It has the full force and authority of a recognition by a parent country, for it is an explicit abandonment of

(*g*) See General Hertzog's *Speech*, Pretoria, December 20, 1926. Keith considers that a mere declaration by the Imperial Conference does not suffice to bring about sovereign independence. He says that international recognition has to be sought by a formal notification sent to foreign Powers by the Imperial Government, intimating the grant of independence, which these Powers would then recognise if they deemed it desirable. This contention conflicts with Hall's view above stated; nor is there any authority, as far as the author is aware, to support Keith in his contention. (*Responsible Government in the Dominions*, 2nd Ed. p. 1232.)

all pretensions over the Dominions by Great Britain, and an acknowledgment of the full and unrestricted independence of those countries. It is a formal, deliberate Declaration of Independence.

The first recognition of the Dominions as States, therefore, was their admission as parties to the Treaty of Versailles (*h*). Their admission to the League of Nations confirmed this recognition. But the most unequivocal international seal on their recognition was the recent election of Canada to the Council of the League. This election to the Council is the pinnacle of international status, for it places Canada (and with Canada, the other Dominion-members of the League) on an equal status with Britain, France, Italy, or any other member of the League of Nations.

(*h*) See Nathan, *Empire Government,* p. 71, quoting General Smuts.

## CHAPTER III.

### THE BRITANNIC ALLIANCE.

Among the British the most far-reaching constitutional changes slip in quietly, unobtrusively, unnoticed. Before the Great War the British Empire signified a central government surrounded by a number of more or less dependent States: to-day it has ceased to be an Empire according to the usual sense of the word and has become in most essential respects a new type of political association, namely, a group of autonomous States organised on a basis of complete constitutional equality under a common Crown (*a*). A change has taken place in inter-Imperial relations. So far as could be ascertained in the reports of debates at Westminster, the approval of the Imperial Parliament to the transference of one new power after another to the Dominions was never sought. It was never sought even by a vote or a resolution in the House of Commons which, directly or indirectly, endorsed the actions of the Imperial Government, that, step by step, sometimes grudgingly, sometimes with long intervals between steps, gradually effected the transfer (*b*). Even in the newspaper press the change was unnoticed. The change consisted of the gradual abandonment of the idea that the Empire could be maintained only by the exercise of superior authority at the centre in London. It is now considered that the voluntary co-operation of independent governments is a better way of maintaining the Empire than the legal control of a number of

(*a*) Prof. Eastwood, *Britannic Partnership*, p. 129; H. Duncan Hall, *British Commonwealth of Nations*, p. 195. Cf. definition in *Inter-Imperial Relations Report*, par. 11.

(*b*) Hurd, *The New Empire Partnership*, p. 214; Porrit, *Fiscal and Diplomatic Freedom of the British Oversea Dominions*, p. 206.

dependent governments by a common superior. The Imperial Conference of 1926 affirmed this doctrine as a principle of political action (*c*).

The terms *British Empire* and *British Commonwealth of Nations* to-day do not indicate the existence either of British bureaucratic or Imperial Federal control. There is no semblance of authority of one part over another; no trace of some super-authority within the Empire; no element of compulsion, whether in the form of Imperial Federation or in the form of a half-way house, the Group Unit (*d*). The Britannic States, taken collectively as a group, does not constitute a Governing Body of Empire; nor does it as a group possess any sovereignty whether delegated, partitioned or limited. If the British Commonwealth of Nations possessed, as a group, any sovereignty, if the Britannic States were in a condition of subordination to the aggregate group comprising the British Commonwealth, it would follow that the aggregate group is constitutionally competent to abolish or abridge the powers and the constitution of any one or more of the groups taken individually. Such a proposition is untenable (*e*).

Neither Great Britain nor any of the Dominions knows any authority over itself except its own free national will. The degree and nature of Dominion status is equal to that of Britain without any inferiority or reservation. Whatever, therefore, may be the nature or the degree of liberty or independence enjoyed by Great Britain, the same will have to apply to the Dominion (*d*).

"Full equality of status between the Dominions and the Mother Country is to-day explicitly and definitely recognised. Of course, that does not mean equality of stature. No resolutions of the Conference can alter the fact that in wealth, in population, in armed power, in accumulated political experience, there are great differences among us." These are the

(*c*) See Prof. H. A. Smith, *Law Quarterly Review*, Vol. XLIII. p. 385.
(*d*) General Hertzog, *Speech*, Pretoria, December 20, 1926.
(*e*) Prof. Kenny, 2 *Cambridge Law Journal*, 1926, pp. 157, 297.

words of a level-headed Secretary of State for the Dominions (*f*). More recently he has defined what is meant by equality of status. "What is meant by equality of status is that as far as the question of right is concerned, every Government of the Empire is, if it so wish, entitled to exercise every function of national and international right" (*g*).

The British Empire is, therefore, at the present moment a political compact intended to be permanent among a group of independent States. In domestic, as well as in external, matters each State is sovereign and independent. The only link that binds them together is the King-link, the allegiance to a common Crown. But this bond in no way affects the full sovereignty of each of the Britannic States either in relation to each other or in relation to other Powers. They are free to agree whether or not they will act together in a particular transaction in a particular manner for a particular purpose. That they spring from common origins; that they owe a common allegiance; that they meet together periodically in equal consultation; that they have well-defined rules and understandings for the conduct of international affairs; that they have a common ideal in the maintenance of world peace and a common interest in the development of their peoples and territories, makes them a British Commonwealth or a Britannic Alliance. As a political organisation this association of States is the most novel, the most important and the most difficult experiment ever yet attempted. Whether it will succeed depends entirely on the restraint exercised by its statesmen in the conduct of foreign affairs.

With the words of the Earl of Balfour in an address to the students of Edinburgh University on January 26, 1927, this chapter is aptly concluded: "You may ask me whether, having roughly explained what I conceive to be the constitution of the Empire, I think it is the best possible constitution that could be contrived. The question is, in my opinion, an idle question,

(*f*) Mr. Amery, "*Some Aspects of the Imperial Conference*," *Journal of Royal Institute of International Affairs*, January, 1927.
(*g*) *British Hansard*, June 29, 1927.

because the constitution now formally declared [by the Imperial Conference] is absolutely the only constitution that is possible if the British Empire is to exist. And we need not argue whether it would be better to have a central authority, whether some means of coercion in extreme cases ought not to be contrived. I do not regard the absence of a central authority with the kind of fears that assail those who are brought up upon legal considerations." The Empire has been held together for a long time past without any central authority. It has been held together by moral considerations of traditions and sentiment; and by material considerations of commerce and defence. These have combined to create and sustain the wish to remain united and have created the readiness in a crisis to act in union (*h*).

(*h*) Sir J. A. Macdonald, in the course of his speech in the Canadian Parliament when introducing the Federation Bill (February 6, 1865), said: "I am strongly of the opinion that, year by year, as we grow in population and strength, England will see more the advantages of maintaining the alliance between British North America and herself. . . . And when, by means of this rapid increase, we become a nation of eight or nine millions of inhabitants, our alliance will be worthy of being sought by great nations of the earth. . . . The Colonies are now in a transition state. Gradually a different colonial system is being developed; and it will become, year by year, less a case of independence on our part, and of overruling protection on the part of the Mother Country, and more a case of healthy and cordial *alliance*." (*Canadian Hansard*, 43—4.)

## CHAPTER IV.

### THE COMMON KINGSHIP.

THERE are three very interesting and instructive precedents in the history of England for a sovereign acting separately in his capacities as sovereign of different countries. The first precedent is the personal union of the Crowns of England and Scotland from 1603 to 1707. During this period the Sovereignties remained entirely distinct, the two countries having separate governments, flags, coinages, armies and so forth. In 1707 a political union was established making of the two countries one sovereignty.

The second precedent is the period from 1688 to 1702, when William III. of England was the political head of three States, namely, King of England, King of Scotland, and Stadhalter of the United Netherlands.

The third and most important precedent is the personal union of the Crowns of Great Britain and Hanover, which lasted from 1714 to 1837, and came to an end only with the accession of Queen Victoria through the operation of the Salic Law preventing female succession to the Hanoverian throne. The distinction between each of the States under the same Crown was fully recognised in international law. The governments of the two States remained absolutely distinct, and war was actually waged by George I. as Elector of Hanover, whilst as King of England he remained neutral. The two States were regarded in international law as merely happening to employ the same agent for a particular class of purpose (*a*). The personal authority of the Monarch was different in each State, just as the statutory powers of His

(*a*) Hall's *International Law*, 8th Ed. pp. 20—24.

Britannic Majesty are to-day different in each of the Britannic States. The Ministers of each State had no control over the actions of the Monarch in the other State, nor had they even the right to advise the Monarch regarding his actions in the other State.

The present position of the King in his relation to the various Britannic States is legally almost exactly similar to the position of George I. as King of Britain and Elector of Hanover (*b*). Just as a common Crown did not make Great Britain and Hanover a single State or prevent their being entirely independent, it does not make the British Commonwealth of Nations a single State nor prevent the Britannic States from being entirely independent. And it makes no difference in international law that in the former case the two States were before the Union entirely independent, whereas the Britannic States were not independent, for the principle of law is the same. Law does not concern itself so much with origins and evolution as with facts actually existing. The problem has now been solved of dissolving the unity of the Crown in the international field as it has been solved in the field of internal Imperial government, without at the same time dissolving the Commonwealth.

That the Britannic Sovereign resides in England and in no Dominion does not alter the legal position as stated, nor elevate the legal status of Great Britain over the Dominions on that account. With the advent of faster transport, the King will undoubtedly spend more time in the Dominions than has hitherto been possible. It is not impossible to picture in the words of Lord Rosebery "the greatest Sovereign in the greatest fleet in the universe . . . departing solemnly for the other hemisphere, not, as in the case of the Portuguese Sovereigns, emigrating to Brazil under the spur of necessity, but under the vigorous embrace of the younger world." In the event of such an occurrence, when the King transfers his permanent residence to the Union of South Africa, or to Canada

(*b*) Lowell, *Foreign Affairs*, Vol. 5, p. 383.

or Australia, a Governor-General of the United Kingdom of Great Britain and Ireland would perform all the royal functions in his place in a manner similar to their performance by the Governor-General of New Zealand, or, in time to come, of India.

Under the present constitutions of the Britannic States a Monarchy is the most suitable form of government. The peoples who inhabit the vast territories of the Crown (except for a short period in the Transvaal and Orange Free State) have never known any form of government but that of a Monarchy. Even in those two territories, as well as throughout the Empire, the very spirit of the people is monarchical. A President-Elect cannot for an immeasurable period of time be anything else but a spectral figure hovering and disappearing on the political horizon. The Dominions are to-day in reality Republics with a King as their hereditary President. He may not be a President-Elect; but heredity is a better way than the ballot-box of choosing the Head of so great and diversified an Empire. It is better that such an office should be hereditary and not thrown open to political barter and competition.

The President-Elect of a State or of an Alliance of States or of a Federation of States must call for the aid of party warfare to elevate him to his office. He must always be an object of envy to some of his own party and of regret to many of his political opponents. His duties can never be thought by the whole nation to be impartially exercised on their behalf, for he is the nominee of a party and of party interests.

But among the British and throughout the length and breadth of the Empire the King as Head of the State is the fountain of justice, the embodiment of perfection, independent of and above the changes and intrigues of party government. He holds in his keeping the laws of all his countries, for the laws are the birthright of all his peoples and may not be changed save with his assent. To him all his subjects may appeal for the redress of wrongs. His chief duties are in the impartial exercise of his royal discretion and in the representa-

tion of the national power and dignity. To the occupant of such an office a whole Empire can owe allegiance without condition and loyalty without regret.

To this King all the citizens of the Britannic States owe a common allegiance. Throughout all the territories of the King persons entering on certain offices are required by law to take the oath of allegiance or to make an affirmation or declaration in lieu of an oath in a manner provided by statute. Aliens becoming naturalised are also required to take the oath of allegiance. But the taking of the statutory oath does not add to the natural duty of the King's subject, for in all cases he is bound in allegiance to the King as though he had taken the oath. This allegiance is owed not to the Government, nor to the Governor-General, nor to the Crown, but to the King in person, that person in whom is centred the royal authority: "*. . . I will be faithful and bear true allegiance to His Majesty King George V., his heirs and successors according to law.*" This oath does not command allegiance to the Governor-General or the Judges or the Government, but to the King himself. Disobedience to the Governor-General is held in law as disobedience to the King, for the Governor-General deputises for the King. This common allegiance of all subjects of his Britannic Majesty to a single Sovereign is the sole legal bond of the Empire.

The common allegiance carries with it also a common nationality; for all persons who were born or naturalised within the King's Dominions are deemed British subjects. But they may be nationals also of a particular Dominion (*c*). But this double nationality does not affect the common allegiance. It is a survival merely of the old idea of Empire, and must disappear as soon as the specific incongruities in the inter-Imperial relationship of the Britannic States are adjusted.

But an anomaly and a disappointment is emphasised by this

(*c*) See, *e.g.*, Union Nationality and Flag Act (No. 40 of), 1927 (Union of South Africa Statutes).

* Ell Calvin's Case
77 E.R. 379.

common allegiance itself. It does not carry with it throughout the Empire the privileges of a common citizenship. In the nature of things as they are this is impossible to rectify.

In the United Kingdom every British subject has the same privileges or political rights as every natural-born Englishman, *e.g.*, an Englishman born in England and the son of English parents settled in England. Thus, a British subject, whatever be the place of his birth, or the race to which he belongs, has, with the rarest possible exceptions, the same right to settle and to trade in England which is possessed by a natural-born Englishman. He has, further, exactly the same political rights. He can, if he satisfies the requirements of the English electoral law, vote for a member of Parliament. He can, if he commends himself to an English constituency, take his seat as a member of Parliament. Within recent years, a member of a race different from probably all his constituents and an adherent of a religion of which they probably knew nothing, a Parsee, took his seat alongside royal-blooded Englishmen. There is no law which forbids any British subject, wherever he be born, or to whatever race he may belong, to become the Prime Minister of Great Britain. The possession of theoretically equal political rights does certainly give in the United Kingdom to every British subject an equality which some British subjects do not possess in some of the Dominions (*d*). In the Union of South Africa, for instance, only British subjects of European descent may be members of the House of Assembly or the Senate. This restriction immediately rules out the opportunity of all those members of races which are not European to hold high, or, indeed, any, political office in South Africa. In the present circumstances obtaining in South Africa, this inequality, however regrettable, is impossible to avoid. The power to make such distinctions springs from the right claimed by each Dominion for many years past of making whatever laws they may choose for their own internal government. The right, *e.g.*, to control

(*d*) Dicey, *Law of the Constitution*, Introduction.

immigration and to determine for itself the composition of its own citizens is inherent in any independent State. Membership of the British Empire cannot impair this right.

"Each constituent part of the Empire," wrote General Smuts in 1923 (*e*), "will settle for itself the nature and incidents of its citizenship. The common Kingship is not a source from which private citizens derive their rights. They derive their rights solely and simply from the authority of the State in which they live.

"There is no equality of British citizenship throughout the Empire. British citizenship has been variable in the past; it is bound to be even more so in the future. It cannot be claimed that whether a British subject has or has not political rights in his country of origin, he should, on migration to another part of the Empire, where British subjects enjoy full political rights, be entitled automatically to the enjoyment of those rights." Each State of the Empire has an absolute and undisputed power and authority to settle such questions for itself.

Thus, the common Kingship, though it carries with it a common British nationality which will in the future be narrowed down to a particular Dominion nationality, denotes no other legal significance than a common allegiance. This common Kingship, by virtue of a common allegiance, is the legal bond, and the only legal bond, of the Empire.

(*e*) Imperial Conference, 1923, *Appendix to the Summary of Proceedings*, p. 138.

## CHAPTER V.

### THE ROYAL AUTHORITY.

THE royal authority extends to the furthermost limits of the territories of the Crown. Except where it has been diminished by legislation either in Great Britain or in the Dominions, it is as extensive in the oversea possessions of the Crown as it is in Great Britain (*a*). For, in the theory of English law, after a Colony has received legislative institutions, the Crown stands, subject to the special provisions of any Colonial or Imperial Act, in the same relation to that Colony as it does to the United Kingdom (*b*). Wherever the King's writ runs, it runs equally, without distinction of race or colour or creed. All subjects of the King are under the law of the King. The law and legislative government of every Dominion and every Colony equally affects all persons and all property within its limits, and is the rule of decision for all questions which arise there. Whoever purchases, lives or sues there puts himself under the law of that place. An Englishman in Ireland, South Africa, Minorca or the Isle of Man, has no privilege distinct from the other inhabitants (*c*). Similarly, the royal authority (*d*) is in each Dominion governed by the law of that Dominion.

(*a*) *Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1892), Appeal Cases, p. 437; *Exchange Bank of Canada* v. *The Queen*, 11 Appeal Cases, p. 157; *Re Bateman's Trust* (1873), Law Reports, 15 Equity, 355.

(*b*) *Re Natal Bishop* (1864), 3 Moodie's Privy Council Cases (New Series), pp. 115, 148.

(*c*) *Campbell* v. *Hall*, 20 State Trials, p. 239; 98 English Reports, p. 1045.

(*d*) The phrase *royal authority* is used as a synonymous term to *royal prerogative*. The royal prerogative, in law, is the exclusive privilege of the Crown. Blackstone says: "By the word prerogative we are to understand

The common law governing the royal authority is generally the same in all the King's territories. Where the greater rights and prerogatives of the Crown are in question, recourse must be had to the common and statute law of England by which alone it can be determined, but where the minor prerogatives are concerned they must be regulated by the established law of the place where the question arose (*e*). The minor prerogatives in the Dominions as in the United Kingdom are regulated by statute. As examples of the latter may be mentioned the prerogatives relating to the coinage and to the appointment of Officers of State (*f*).

The greater prerogatives are those concerned with the declaration of war or the making of peace, the negotiations with foreign nations, the making of treaties, and the right of His Majesty to hear any petition for the redress of wrongs through his Privy Council (*e.g.*, granting leave to appeal to the Privy Council or a fiat for a petition of right). Questions regarding these matters are determined by the common or statute law of England.

The existing prerogative may, however, best be divided into those affecting the external relations of the Empire and those prerogatives which govern internal matters. Among the

the character and power which the Sovereign hath over and above all other persons, in right of his real dignity; and which, though part of the common law of the country, is out of its ordinary course. This is expressed in its very name, for it signifies in its etymology something that is required or demanded before or in preference to all others; and accordingly Finch lays it down as a maxim that the prerogative is that law in the case of the King which is law in no case of the subject." (See Stephen's *Commentaries*, Vol. II. Bk. IV. Pt. I. Ch. VI.; and Halsbury's *Laws of England*, Vol. VI. p. 543.)

(*e*) *Attorney-General* v. *Black* (1828), King's Bench Reports, p. 225. See also *Natal Bishop's Case*, *supra*.

(*f*) It is conceivable that constitutional conventions may govern the exercise of the prerogatives in one Dominion differently from the exercise of those prerogatives in other Dominions. The clearest example is, of course, the convention that no titles should be conferred in the Union of South Africa, as a consequence of a resolution of the Union House of Assembly to that effect. Different considerations in the different Dominions may affect the constitutional conventions relating to the dissolution of Parliament.

former, the power of making war and concluding peace is the most important. As incidents of this power the King has the right of sending and receiving ambassadors, of concluding treaties, of granting passports, safe-conducts, letters of marque and reprisals. These powers may be limited by international agreement; thus, the Declaration of Paris in 1856 abolished privateering as far as the assenting nations were concerned.

The internal prerogatives may be divided generally into those which are personal, those which are political, and those which are judicial.

The theory of the personal prerogative is briefly as follows. In order that there may always be an existing Head of the State, the King is regarded as a Corporation. He cannot die. There can be only a demise of the Crown, a transfer of the royal authority to a different person. He cannot be sued, for he can do no wrong. Any injury suffered by a subject at the hands of the King is to be attributed to the mistake of his advisers. Generally, no lapse of time will bar the right of the Crown to prosecute. The King has also several personal privileges of minor importance, such as the title of Majesty, the right to a royal salute, and to the use of the Royal Standard.

Politically, the King is the supreme executive and co-ordinate legislative authority. As paramount authority in Parliament he can dissolve or prorogue it at pleasure. In theory, Parliament only exists at his will, for it is summoned by his signature. He can refuse his assent to a bill, but this right has not been exercised in England since 1707. All land is mediately or immediately held of him. Lands derelict suddenly by the sea, lands newly discovered by subjects, are his. He has power to issue proclamations and (with the assent of the Privy Council) orders in council, in some cases as part of the ancient prerogative, in others under the provisions of an Act of Parliament. The great Officers of State are appointed by him. He is in supreme command of the army and navy for the defence of the realm.

Judicially, the King is the fountain of justice and the supreme conservator of the peace of the realm. "By the

fountain of justice," Blackstone says (*g*), "the law does not mean the *author* or *original*, but only the distributer. Justice is not derived from the Sovereign, as from his *free gift;* but he is the steward of the public to dispense it to whom it is *due*. He is not the spring, but the reservoir, from whence right and equity are conducted, by a thousand channels, to every individual." He is the keeper of the laws of all his people, which cannot be altered save with his assent. As supreme conservator of the peace the King is the prosecutor of all crimes. Indictments for certain crimes in all parts of the Empire still conclude with the words *against the peace of our lord the King, his Crown and dignity* (*h*).

The enumeration of these prerogatives is important, for they exist throughout the Dominions and are exercised for the King in the Dominions by his officers or representatives. The King is King of each Dominion (*i*). He may act for one Dominion in his capacity as King of that Dominion as distinguished from every other territory. When so acting he acts on the advice of his Ministers in that Dominion, and it is unconstitutional for the Ministers of any other Britannic State to advise him in such matters (*k*).

(*g*) Stephen's *Commentaries,* Vol. II. Bk. IV. Pt. I. Ch. VI.

(*h*) In South Africa the words *His Majesty and his Government* are often used.

(*i*) Nathan, *Empire Government,* p. 36.

(*k*) *Inter-Imperial Relations Report,* IV. (c).

## CHAPTER VI.

### THE RIGHT OF SECESSION.

During the nineteenth century up to about the year 1880 it was the accepted doctrine of English statesmanship that any self-governing Colony would be allowed to secede at its pleasure. Both Sir William Molesworth and Lord Brougham declared that an amicable separation from Great Britain would be a great advantage (*a*). Even Disraeli pronounced the Colonies to be heavy incumbrances, but incumbrances which happily would leave us at short notice. In 1867 the sonorous tones of Bright in the House of Commons were heard to declare that "if Canada is to be constantly applying to us for guarantees for railways and grants for defence, it would be far cheaper for us, and less demoralising for them, that it should become an independent State." Professor Goldwin Smith described the Colonies as parasites clinging round the trunk of the British nation, and he feared the naval and military responsibility of having to defend them. "Men ask," he wrote, "what we can give to England in place of these useless dependencies? As well ask what we shall give to a man in place of his heavy burdens or of his dangerous diseases? We shall give him unencumbered strength and the vigour of reviving health"(*b*). It is clear that secession could then have been accomplished without those painful accompaniments of havoc, bloodshed and war.

But about 1885 there was an alteration of feeling; and the first phrases were heard of the sentiment of Imperialism. Cecil Rhodes dreamed of a "great red route" and a huge African Empire. Dying, his gaze was to the North. Chamberlain

(*a*) See Chapter I., *supra*.
(*b*) See Prof. Kenny, 2 *Cambridge Law Journal*, 1926, p. 157.

stirred the imagination. Milner and Kitchener, too practical to dream like Rhodes dreamed, built on his foundations. English statesmen no longer regarded with philosophic calm the dawn of the day when any one of the Dominions might secede from the Empire. The Empire was something that men wanted to hold together, to maintain, to see growing greater and more powerful.

After the Great War the sentiment in regard to the Empire entered on a new era. Statesmen still desired its maintenance; there was a justifiable pride in the greatness of an Empire that had weathered so terrible a storm. But the prevailing sentiment was that of co-operation. As Mr. Amery remarked later, "The conception of co-operation is far stronger to-day throughout the Empire than it ever was. We learned something of its value in the war when it came to co-operating for the Empire's common existence and security." There now existed a spirit of freedom, without any element of compulsion, in regard to the connection of the Dominions with Great Britain. On March 31, 1920, the British Prime Minister, Mr. Bonar Law, made his famous statement in the House of Commons: "There is not a man in this House who would not admit that the connection of the Dominions with the Empire depends upon themselves. If the self-governing Dominions chose to-morrow to say, 'We will no longer make a part of the British Empire,' we would not force them." Viscount Sandon in 1923 quoted Bonar Law's remarks with approval, and said that any self-governing Dominion was free to secede at any moment it wished. He added the shrewd remark that "this is where our strength lies," meaning, the Dominions were part of the Empire because they really desired it. The British Commonwealth was a union of interests.

In the case of Ireland the right was not admitted by Britain. "No such right can ever be acknowledged by us," declared the British Prime Minister (*c*) in 1921. "The geographical propinquity of Ireland to Great Britain is a fundamental fact."

(*c*) Letter to the London *Times*, August 15, 1921.

The obvious inference from this statement is that New Zealand, whose distance from Great Britain is enormous, has the right to secede. Therefore, on the principle of the equal status of the Dominions, all the Dominions, including Ireland, have the right to secede. What Mr. Lloyd George obviously meant to convey was that even though Ireland might have that right, Britain would not, on account of geographical propinquity, allow her to exercise that right. But even so, the position is different, for Ireland and Britain are bound together by a Treaty between them negativing secession.

In the Dominions there raged a fierce controversy. Sir Robert Borden asserted (*d*) that Canada was free to leave the Empire if she chose; but he emphasised the advantages of the British connection as assuring greater protection, giving increased prestige and influence in the world, and yet leaving the Dominions absolutely autonomous.

However correct Sir Robert Borden's view might be when considered from its political aspect, it is safe to say that no normal constitutional means exist by which a Dominion might secede from the British Empire. Legally, that is, without disturbing existing legal ties and without trespassing existing constitutional procedure, it is impossible for a Dominion to secede from the British Empire. By the British Empire we mean, as stated above (*e*), an alliance or group of independent States bound together by a common King. To secede from the Empire a Dominion must deny allegiance to the common King, and substitute in his place another King or President.

Duncan Hall (*f*), in his well-known work on the British Commonwealth, declares that a Dominion has a constitutional right to secede, and he quotes General Hertzog's argument that as the Dominions are in every way equal in status to Great Britain, and as Great Britain has the Constitutional right to declare itself a republic, so also have the Dominions the constitutional right to declare themselves republics. But Duncan

(*d*) *Canadian Hansard*, August 17, 1925.
(*e*) See Chapter III.
(*f*) *British Commonwealth of Nations*, p. 262.

Hall, and all who argue in this strain, forget that Great Britain has not the constitutional right to declare itself a republic. Loyalty to the person of the King is a fundamental principle of the British Constitution. The King cannot dethrone himself, that is, cannot assent to a bill abolishing himself, and the introduction of such a bill would be actual treason (*g*). Nor can the King create another sovereign in any part of his Dominions (*h*): he, therefore, could not assent to any bill which aimed at creating another sovereign in a Dominion.

The actual legal position must not be confused with the political situation. Legal right and political power are distinguishable and separate; and however reluctant politicians may be to recognise the distinction, a scientific treatise has no option but to do so, and to point it out as clearly as possible. We are not considering what Bonar Law and Lloyd George declared to be the political right of the Dominions to secede, that is, a violation of the constitution which Great Britain would connive at for political reasons. We are considering the legal position. A bill purporting to sever the ties between a Dominion and Great Britain or a Dominion and the Empire would, in the ordinary and normal course of legal procedure, have to be vetoed (*i*). Legal assent could not be accorded even after full agreement at an Imperial Conference with the concurrence of the whole Empire. But should assent be given to such a bill or should an international agreement between the Britannic States be drawn up having the effect of dissecting a Dominion from the Empire, then the matter passes at once from the realms of strict constitutional right into the realms of political expediency. At such a time legal forms go by the board.

Nor must the legal position be confused with the right of the Crown to cede part of its territories to a foreign Power.

(*g*) Such an act would have the effect of destroying the King. See Stephen's *Digest of Criminal Law*, 5th Ed. p. 42.

(*h*) 4 Coke's *Institutes*, 287.

(*i*) Keith, article on *Imperial Conference*, 1926, in the *Journal of Comparative Legislation and International Law*, 3rd series, Vol. IX. i. p. 87.

This right the Crown undoubtedly possesses; but it is very different from the King of Britain dethroning himself by ceding the whole of Britain to another sovereign, or the King of Canada ceding the whole of Canada to another sovereign. For, in the latter case, as far as the particular Dominion is concerned, he dethrones himself and thus violates the Constitution; but when the King cedes, say, the Isle of Wight or the territory of Labrador, he does not dethrone himself or destroy himself. He is merely exercising a legal prerogative.

The right of secession has been considered by politicians from the point of view only of asserting the independence of a Dominion. It was thought that a Dominion could become sovereign and independent only by secession from the British Empire. But the position as it now stands is that the Dominions are sovereign and independent without seceding from the Empire. They may exercise every function, national and international, of a sovereign State. But, being monarchical States, that is, Kingdoms, they have no constitutional right to abolish that which is inherent in them as monarchical States, namely, the Kingship. To do this would be an illegal act. Therefore, from every point of legal authority (*k*), the Dominions have no constitutional right of secession from the Empire, that is, they have no right to abolish the Kingship and thus put an end to the sole legal bond which alone makes them parts of the Empire. Thus is the King the Empire's cement.

(*k*) Secession is further made impossible in any known legal manner by a Bill of any Dominion Parliament, because such a Bill would be beyond the powers of a Legislature which in law is inherently subordinate (see Chapter X., *infra*); or such a Bill would be repugnant to the present Constitution Acts of the Dominions (see Chapter XI., *infra*), for those Acts never contemplated granting the Dominion Legislatures the power to abolish the Kingship.

## CHAPTER VII.

### THE RIGHT OF NEUTRALITY.

In 1870 a Royal Commission appointed by the Governor of Victoria issued a Report in which occurred the following paragraphs:—

"19. The Colony of Victoria possesses a separate Parliament, Government and distinguishing flag; a separate naval and military establishment. All the public appointments are made by the local Government. The single function of a sovereign State as understood in international law, which the Colony does not exercise or possess, is the power of contracting obligations with other States. The want of this power alone distinguishes her position from that of States undoubtedly sovereign.

"20. If the Queen were authorised by the Imperial Parliament to concede to the greater Colonies the right to make treaties, it is contended that they would fulfil the conditions constituting a sovereign State in as full and perfect a sense as any of the smaller States cited by public jurists to illustrate this rule of limited responsibility. . . .

"21. It must not be forgotten that this is a subject in which the interests of the Colonies and of the Mother Country are identical. British statesmen have long aimed not only to limit more and more the expenditure incurred for the defence of distant Colonies, but to withdraw more and more from all ostensible responsibility for their defence; and they would probably see any honourable method of adjusting the present anomalous relations with no less satisfaction than we should.

"22. Nor would the recognition of the neutrality of the

self-governing Colonies deprive them of the power of aiding the Mother Country in any just and necessary war. On the contrary, it would enable them to aid her with more dignity and effect, as a sovereign State could, of its own free will, and at whatever period it thought proper, elect to become a party to the war."

This document reads strange as coming from the loyal and submissive Colony which bears the name of the Great Queen. Canada (*a*) and South Africa are not the only Dominions whose consciences have been disturbed by the thought of neutrality.

So great an authority as Professor Pearce Higgins holds that should a war be declared against Great Britain by any foreign State, it still appears to be the case that the Britannic States—the Dominions—willing or unwilling, would be involved. If this is so, then the whole theory of Dominion independence is a delusion. It must be borne in mind as an extremely important factor in considering the right of the Dominions to remain neutral when Britain is at war that an inter-Imperial compact has never been made that no British declaration of war or peace shall be issued without Dominion assent. But this can be explained by the fact that the Imperial Government could never consent to limit its action in any way in so vital a matter as the power of an immediate declaration of war. So much so is this the case that this power is exercised exclusively by the Sovereign; and Parliament is

(*a*) The Canadian Prime Minister, Sir John Macdonald, when, in 1885, the United Kingdom was engaged in war in the Soudan, and Australia and New Zealand had offered contingents, said in a letter to Sir Charles Tupper (March 12) that "the time had not arrived, nor the occasion, for our volunteering military aid to the Mother Country. We do not stand at all in the same position as Australia. The Suez Canal is nothing to us, and we do not ask England to quarrel with France or Germany for our sakes. The offer of those Colonies is a good move on their part, and somewhat like Cavour's sending Sardinian troops to the Crimea. Why should we waste money and men in this wretched business? . . . Again, the reciprocal aid to be given by the Colonies and England should be a matter of treaty, deliberately entered into and settled on a permanent basis." (Pope, *Correspondence of Sir John Macdonald*, 1840—1891, pp. 337—8.)

never even consulted as to the advisability or propriety of such an action.

When Great Britain and Hanover were united under a common Sovereign, one country might have been at war while the other was neutral. This, once, was actually the case. The Elector of Hanover declared war on the advice of the Hanoverian Government, and this declaration of war in no way affected the neutrality of Great Britain. Bearing in mind the perfect equality of each of the Britannic States, it would be absurd to say that inasmuch as the British Government can in effect declare war for all the Britannic States, so can the New Zealand or South African Government in effect declare war for all the Britannic States. The British Government, with its complex diplomatic entanglements, could never accept a proposition which would allow, say, South Africa, by declaring war against Portugal over some neighbourly disagreement, to embroil the whole of the British Empire. And as such a proposition is manifestly untenable for Great Britain, by reason of the perfect equality of the status of Great Britain with the other Britannic States, it is equally untenable for the other Britannic States. The true position is that the King declares war for that country whose Government advises him to declare war, and for that country only. Before the whole Empire can be at war, each of the free Governments of the Empire must advise the King to declare war and the King then declares war, not in the name of all the governments of the Empire simultaneously and together, but in the name of each government of the Empire separately, in separate proclamations, each signed, if need be, by each particular Secretary for External or Foreign Affairs.

That this is the correct position is a direct inference from the statement of Mr. Amery in the British House of Commons on June 29, 1927, that "every Government of the Empire, if it so wish, is entitled to exercise every function of national and international right." If it is not the correct position, then it means that the Dominions are not international State units, that is, are not internationally free and

sovereign States. The Dominions being in every aspect of their domestic and external affairs, equal in status to Great Britain (*b*), it follows that Great Britain is not an internationally free and sovereign State; which, again, is absurd.

The Inter-Imperial Relations Report declared that free co-operation (*b*) is the guiding principle of action of the British Commonwealth. By this it means that each of the Britannic States is the sole judge of the extent of its co-operation with any of the other Britannic States. Then, if Canada, for instance, declares war against any country, it follows that the other Britannic States are free to co-operate or refrain from co-operating with Canada, that is, free to declare war against the same State against which Canada declared war. This co-operation may be active, in the sense of an active participation in the war with men and materials, or it may be passive, as limited to a bare declaration of war in order thereby to embarrass the enemy of Canada by preventing trade and communication with her nationals.

The question of neutrality must necessarily be a matter of deepest concern to the League of Nations. The League of Nations imposes, under certain circumstances, neutrality as a duty on all its members. If neither Great Britain nor any of the Dominions has the right to individual neutrality in the case of any other member of the British Commonwealth being at war, then that duty to remain neutral imposed by the Covenant of the League on all its members, cannot in such a case hold in respect of Great Britain and the Dominions—the Britannic States—who are all members of the League of Nations. If that is so, then it can only be because, in some way or other, the Covenant of the League provides for a special exemption in the case of Great Britain and the Dominions from the duty of remaining neutral in the event of a war in which one or other of them is a belligerent (*c*).

It is true that the Covenant of the League contains in effect a notification to the world that Great Britain and the

(*b*) See *Inter-Imperial Relations Report*, 1926, par. II.
(*c*) General Hertzog, *Union Hansard*, March 8, 1928.

Dominions individually contract to become separate State members of the League subject to their being, and subject to the right of their continuing to be, members of the British Empire. Having become members of the League upon condition that their membership of the British Empire shall not be interfered with, the League can under no circumstances demand from any one of the Britannic States the performance of a League duty the execution of which must entail the severance of its Imperial relations. Hence the League can under no circumstances demand from a Dominion that it shall take up arms or commit any other act of hostility against Great Britain or any other Dominion. That is, the League exempts a Dominion from an active participation in war against Great Britain, but it nowhere exempts a Dominion from remaining neutral when Britain or another Dominion is at war. If a Dominion has a right to remain neutral apart from the Covenant of the League, then this obligation imposed on a Dominion as a member of the League of Nations is not an obligation which affects Imperial relations. But if a Dominion has no right to remain neutral when Britain is at war, then, when one of the Dominions has been declared an aggressor by the Council of the League of Nations, it follows that Great Britain and all the other Dominions must equally be declared aggressors, and, therefore, that the Britannic States are not international units even in the League of Nations: which is against the plain understanding of the world. It would have been unnecessary, then, to admit the Dominions as members of the League, and it was a flagrant breach of the Covenant to admit Canada to a seat on the Council of the League of Nations. The only logical conclusion, therefore, that can be arrived at, is that the Dominions were admitted to the League as international State units having the right to remain neutral when Great Britain or any portion of the British Empire was at war. And we are brought to this conclusion by the concurring testimony of facts and principles and the opinion of the leading statesmen of the British Empire. It is the only view which coincides with the

fact that the Dominions are members of the League of Nations at all.

If it is necessary to remove any doubts as to the correctness of this conclusion, it is required only to refer to the saving clause in the Treaty of Locarno, 1925: "The present Treaty shall impose no obligation upon any of the British Dominions or upon India, unless the Government of such Dominion or of India signifies its acceptance thereof" (*d*). This clause in a Treaty is approved of in the Inter-Imperial Relations Report (*e*); and, what has the same effect, a treaty may be made by the King on behalf of one Dominion only (*e*). The effect of this saving clause, or of making a treaty for one Dominion only, is that no other Dominion is bound by that treaty. There is no obligation to enforce that treaty, that is, to go to war to enforce that treaty, even though the signatory Dominion choose to go to war to enforce the treaty. If a treaty impose an obligation on, say, Britain, to aid another State by force of arms, and also specifically, as in the Locarno Treaty, mentions that it imposes no obligations on the Dominions, then when Britain goes to war in fulfilment of the treaty, obviously the other Dominions may remain neutral. Nor can it be said that this is a special concession by Britain to the Dominions, for, it has been noted, a treaty may be made for one Dominion alone, imposing obligations on that Dominion alone, involving that Dominion alone in war. If such a treaty, by involving that Dominion in war, *ipso facto* involved the other Britannic States in war, Great Britain, if she had the right to do so, would never consent to a Dominion making a treaty for herself alone. But this right is specially granted in the Inter-Imperial Relations Report. Therefore, a war carried on by one Britannic State cannot involve the other Britannic States. Which is another way of saying that each Britannic State has the right of neutrality when another Britannic State is at war.

(*d*) Article 9, Locarno Treaty.
(*e*) Paragraph V. (a).

General Hertzog states that this right existed before the Great War (*f*), but it seems that it came into existence only when the Dominions were admitted as members of the League of Nations, or, at the earliest, after the signing of the Peace Treaty by the Dominions as separate signatories.

It is not to be assumed that because the Dominions possess this right of neutrality it will always be exercised. Undoubtedly, should the weary Titan ever stagger under a load too heavy, the Dominions will come to its aid, as they did in the Great War, pouring men and treasure when they could so little afford either. The Britannic States dare not allow one of their number, especially Britain, to be vanquished; for, should that happen, the British Empire will truly be disrupted, the world will lose its greatest instrument for peace, and the little brothers of a mighty Alliance will be left lonesome, unbefriended, swallowed up in the chaos of the Armageddon that must inevitably follow.

(*f*) *Union Hansard,* March 8, 1928.

## CHAPTER VIII.

### THE BRITANNIC ALLIANCE COMPARED WITH THE LEAGUE OF NATIONS.

The Britannic Alliance affords an instructive and interesting comparison with the League of Nations. The League is a development in international law which was to be expected, which lawyers have recognised, and to which the law has been shaped and applied. Law is progressive, and not so stereotyped that its well settled and generally acknowledged principles cannot be applied to new circumstances.

As a political institution in constitutional or international law, the League is *sui generis*. Whatever the League may be, it is not a State. It has none of the attributes of a sovereign Power. It does not govern and it makes no laws. It functions through an Assembly, a Council and a permanent Secretariat; but none of these have any compulsory power over the individual States. The Council of the League of Nations is not the Parliament of the executive power of the League any more than the Imperial Conference is the Parliament or executive power of the British Commonwealth (*a*).

The League is often referred to as a super-State, but this is a mere rhetorical expression. It is an association of States which, while they each retain their own sovereignty and status, have agreed with one another to pursue a certain line of conduct in international affairs as laid down in the Covenant between them and to co-operate in certain matters of general international concern (*b*).

(*a*) Per Wessels, J.A., in *Rex* v. *Christian* (1924), Appellate Division of the Supreme Court of South Africa Reports, p. 136.

(*b*) Per Innes, C.J., in *Rex* v. *Christian, ibid.* p. 109.

Except that the Britannic Alliance has no Covenant or written Constitution, this definition of the League can apply to the Britannic Alliance.

The authors of the League, consciously or unconsciously, were creating for the first time a thing in international law analogous to the body corporate in municipal law (*c*). They were creating a subject of rights and duties of a limited and definite scope and of a nature different from the subjects of rights and duties which almost alone had hitherto been recognised in international law.

Such a subject differs widely from a Confederation. A Confederation is a union of States based on a renunciation by each State of some of its most important activities, including, as a rule, the conduct of its relations with its neighbours outside the Confederation and the power of war and peace. Each State subtracts something from itself, and it is from the sum of these subtractions that the new thing, the Confederacy, is built up. Thus, a Confederation brings nothing new into the international world. Its construction is in no sense a creation.

The League, on the other hand, is a new and positive creation, not merely the result of subtraction and addition. Existing States remain as they were, but a new creation of definite capacities has been added; not a State, not a Confederation, but a subject of definite rights and duties having a *persona* in international law.

In municipal law, a body or a limited liability company is not the simple result of a surrender of powers, rights and duties by the corporators or shareholders. When a person buys shares he does not surrender any part of his personality. Not the purchase-price of shares, but the acts of persons and the concurrence of wills creates the new personality. Even so, in international law the concurrent wills of the interested

(*c*) For the rest of this chapter, in its reference to the League of Nations, the author is entirely indebted to an illuminating article by Sir John Fischer Williams, C.B.E., K.C., published in the Report of the *Thirty-Fourth Conference of the International Law Association*, 1926.

States make the League. It is not a composite building made out of materials which each State has taken from its own store leaving itself thereby the poorer. The League is no more a super-State than a limited company is a super-man.

To show the positive personality of the League, that it has a common will, a single corporate conscience, rights and duties, needs but a few illustrations. The League has the trusteeship of the Saar Valley (*d*), and the guardianship of the free city of Dantzig (*e*); both of which facts illustrate its corporate conscience. Its employees can sue it for arrears of salary or for damages for wrongful dismissal. Waiving its international immunity, it has defended successfully an action in a Swiss Court. It can occupy buildings and own property. It is registered in the local land registry at Geneva as owner of the premises where its activities are carried on. It therefore has rights and duties.

But it is not a partnership. If it were a mere partnership without collective personality there would be a change in the legal or equitable ownership of the League property when a new member enters the League. But there is no such change and members may join and leave the League without affecting the ownership of League property, the duties towards members or the previous decisions of the common corporate will usually taken by a majority vote.

The Britannic States by combining into an Alliance or Commonwealth neither change the status of the individual constituent States of the Alliance nor create a new body of any nature whatever. It becomes neither a State nor a Confederation nor a creation of any kind known to international or constitutional law. It has no *persona*, no rights and duties of any kind. It also is not a partnership.

A meeting of the Council of the League is not a meeting of the individual Powers concerned, a point illustrated by the appeal of the Austrian Republic in 1922 for financial assistance addressed to the particular Governments represented on

(*d*) Article 49, *Covenant of the League of Nations*.
(*e*) Article 102, *ibid*.

the Council. This appeal had to be referred by all those Governments to the League for the decision of the Council of the League. In the British Commonwealth the position is the exact reverse, for a meeting of the Imperial Conference is a meeting of the countries represented at the Conference.

The Britannic Alliance has no personality, can own no property except as a partnership, has no corporate conscience, cannot sue or be sued, and has only a common will when acting together after consultation and agreement in a definite transaction. It is merely a name indicating, not a body corporate like the League, nor a Confederation like the United States of America, nor a Union like the Union of Soviet Republics, but an association of States free to agree whether or not they will act in a particular transaction in a particular manner for a particular purpose.

# Part II.

# INTERNAL SOVEREIGNTY.

> Whether they are right or whether they are wrong—more, perhaps, when they are wrong than when they are right—they cannot be made amenable by force; mutual good feeling, community of interest, and abstention from pressing rightful claims to their logical conclusion, can alone hold together a true Colonial Empire.—*Sir C. P. Lucas.*

## CHAPTER IX.

### SUBORDINATION.

Sovereignty may be considered either in relation to other States or in relation to its subjects and persons who live in its territory. The former may be described as external sovereignty and the latter as internal sovereignty. This distinction between external and internal sovereignty is inherent. *Primâ facie,* a State which has the full and exclusive right to make laws for its subjects and inhabitants and to enforce those laws, possesses internal sovereignty. All the characteristics of internal sovereignty are contained in this, to have power to give laws to each and every one of the inhabitants and subjects of the State and to receive none from them (*a*).

When once a State obtains external sovereignty, its sovereignty may be said to be absolute. It has been pointed out above in the discussion on Status (*b*) that the Dominions obtained absolute sovereignty soon after the Great War. But they had won internal sovereignty with the grant to them of responsible government. From that day, it could be assumed, the Dominions were, each of them, master in their own household. But there were certain limitations to that internal sovereignty; and these limitations persist even now; yet the Dominions do not, by reason of these limitations, cease to be sovereign internally. These limitations are retained by consent, by agreement, as matters of convenience, for the more harmonious governance of the whole Empire. They are not evidence of subordination on the part of one partner in the Empire to another (*c*). If the Dominions so wish, these limitations would be removed in a legal and constitutional

(*a*) Bodin, *de la Republique,* Bk. 1, ch. 8.

(*b*) See Chapter II.

(*c*) Mr. Amery, *British Hansard,* June 29, 1927; General Hertzog, *Union Hansard,* March 8, 1928, quoted in Chapter II., *supra.*

manner (*d*); and though it is neither necessary nor desirable to remove them all, certain modifications are required and will soon be effected.

The reason why these limitations will have to be removed or modified is because they are based upon a theory of Empire which assumed that the Dominions would always remain subject to the general control of the Imperial Parliament. The Dominions are not now what they were when their constitutions were first framed. They were then but colonies on whom their Mother Country was pleased to bestow constitutions. In their constitutions, therefore, the apron strings are very much in evidence. "It is clear from them," writes Darrel Figgis, "that the mother did not propose to let the children wander far from her control, even though she permitted them to walk. Not only in the actual provisions of these constitutions, but in their very conception and plan, drawn exactly according to English methods and experience, it is evident that a state of perpetual tutelage was imagined for the peoples to whom they were given" (*e*). If Mr. Figgis uses strong language, it is because he writes of the written constitutions of the Dominions. But he continues: "The Dominions have moved onwards, and away from their written constitutions. They act now more in the custom of the constitution than in the letter of the constitution." The strict letter of the law remains; but the conventions of the constitution are superimposed upon the law and modify political relations (*f*).

It is these conventions of the constitution which have governed the whole development of the Dominions and which still govern inter-Imperial relations to-day.

A principle was laid down by the great Lord Mansfield in the celebrated case of *Campbell* v. *Hall* (*g*) that once a

(*d*) *Inter-Imperial Relations Report,* 1926, IV. (c) and (d).

(*e*) *Irish Constitution,* p. 9.

(*f*) Anson, *Law and Custom of the Constitution,* 3rd Ed. Vol. I. p. 23; Lowell, *Government of England,* Vol. I. pp. 10, 11; Dicey, *Law of the Constitution,* 8th Ed. pp. 414—428.

(*g*) 20 State Trials, p. 239; 98 English Reports, p. 1045; see also *Phillips*

charter unconditionally conferring representative institutions upon a community has been granted by the Crown, then even the power to control that community by an Order in Council is forever gone. That community became entirely self-governing in its internal affairs. It possessed internal sovereignty. Strictly speaking, the Imperial Parliament might revoke the grant of self-government. But this has never been done. It has never been done because there arose out of the principle of law stated by Lord Mansfield an understanding, or a convention of the constitution, that the Imperial Government would not interfere with the internal government of a self-governing Colony. In the height of the Boer War a strong petition, widely supported even in South Africa, to suspend the constitution of the Cape, was ignored by the Imperial Government, even though the Imperial troops had occupied the whole of the Colony for the purpose of carrying on the war. Nor was Newfoundland deprived, in the famous financial crisis of 1894, of its constitutional right to control its own internal affairs. And in 1927, during the storm caused in South Africa by the bill to create a national flag for the Union, all communications and requests to the Secretary of State for the Dominions to interfere with the proposed legislation, were, properly, ignored.

Nevertheless, there always has been in the past a certain amount of Imperial control. The essential feature of responsible government when it was first introduced was the division between Imperial and local matters. Imperial concerns were to be retained absolutely by the Imperial Government; local matters were given over to the local legislature. In these local matters the Imperial Government never interfered. In Imperial matters there has been a gradual development of the conception of the narrower sense of the Imperial interest. "It may be said in a wider sense that the good or bad government of a Colony was a matter of intense im-

v. *Eyre* (1870), Law Reports, 6 Queen's Bench, p. 1. The grant was irrevocable unless reserved in the instrument by which the constitution was granted.

portance to the Empire as a whole; but it was of more importance to the Colony; and the Colony was always left to decide whether or not it approved of its own government. The principle was a wise one. The various parts of the Empire developed internally along their own lines; there was no effort at uniformity, even if that uniformity was better in theory than the diversity which independence always produces. The real life of the Empire might have failed entirely to survive artificial uniformity; for the Empire was an organism in which the development of the whole was dependent on the free growth of the various parts" (*h*).

This convention, namely, that the Imperial Government would not interfere in the internal affairs of a Colony, as the Colonies grew into Dominions, and the Dominions into independent States, ripened into the rule of international law, that the domestic affairs of the Britannic States are the sole concern of those States, subject to no interference by any other international State, not even by Great Britain. This convention in its early stage was the seed from which sovereign independence grew. Throughout its existence it has been and is to-day merely an understanding, a convention. It cannot be found in any statute, in any judicial decision; it is in law unenforceable and unrecognised; but it is, in practice, in Britain and throughout the Dominions the life-blood of the Britannic Alliance. Though legal interference by the Imperial Parliament is still possible, it would never be attempted. The people of the Dominions would not tolerate it and would resist it to the utmost. This probable resistance has always been and is to-day the sanction of this fundamental convention.

Therefore, in practice, the legal superiority of the Imperial Parliament has little political worth. Actually, the legal position is as follows: There does not exist in any part of the British Empire any person or body of persons, executive, legislative or judicial, which can pronounce void any enact-

(*h*) Keith, *Responsible Government in the Dominions*, p. 284 (1st Ed.).

ment passed by the Imperial Parliament. The Imperial Parliament can legislate for any part of the world over which it chooses to legislate (*i*). This right is subject only to the possibility of its being unable to enforce the laws beyond the limits of its own territory. Blackstone, writing in 1765, correctly expressed not only the legal doctrine as accepted in forensic theory by all jurists, but also the constitutional doctrine as accepted by all statesmen, of the relations of the Imperial Parliament to the Dominions. The King in Parliament was supreme. "Ireland," wrote Blackstone, "is a dependent subordinate Kingdom. Our American Plantations are dependent Dominions: they are subject to the control of the Parliament, though, like Ireland, they are not bound by any Acts of Parliament unless particularly mentioned" (*k*).

In the same year as that in which Blackstone wrote these words, the Imperial Parliament passed an Act which recited the American claim that only their own General Assemblies could impose taxes on them, and went on to declare that on the contrary the Parliament of Great Britain "hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the Crown of Great Britain, in all cases whatever." This position, including even the right to tax unrepresented communities, has never to this day been abandoned by the law of England. It was admitted as the correct legal position by Lord Chancellor Cave in 1924.

The constitutions of all the Dominions owe their existence to Acts of the Imperial Parliament. Their constitutions *are* Acts of the Imperial Parliament. As they were made by the Imperial Parliament so can they be modified by the Imperial Parliament. The British North America Act, 1907, repealed section 118 of the Constitution of 1867 (as a consequence of an address from the Canadian Parliament itself to the King praying for its enactment).

(*i*) *Trial of Earl Russel* (1901), Appeal Cases (England), p. 446.

(*k*) *Institutes*, p. 98. See Prof. Kenny, 2 *Cambridge Law Journal*, 1926, p. 157.

If the Imperial Parliament enacted the Dominion constitutions, if by it those constitutions may be modified, by it also they may be abolished. However revolutionary and startling such an Act would be, it would in law be a valid statute, and anyone in the Dominions disobeying its provisions might be indicted for a crime; for in technical legal doctrine the sovereignty of the Imperial Parliament is still as absolute in Toronto and in Cape Town as it is in London or Cambridge. But, needless to say, "no such abolishing Act would be contemplated by any Imperial Ministry; and, if contemplated, would never be enacted; and, if enacted, would never be obeyed. The form of the law as enunciated by Blackstone persists, but its spirit and force are gone. Legal forms are worthless if political forces control them" (*l*). What Professor Kenny calls political forces are in reality the conventions of constitutional practice which have as their sanction political force. These conventions have now reached the stage when the letter of the law is, politically speaking, quite worthless. The technical problem with which we are now faced is that of making the text of the law correspond to the political reality. Legal fictions are useful so long as they do not blind us to the realities; and, even though the spirit of co-operation and loyalty in the Dominions makes them in practice move within the limits laid down by these ancient laws to the detriment of their tangible rights, the time has now arrived to modify them or sweep them away.

(*l*) Prof. Kenny, 2 *Cambridge Law Journal*, 1926, p. 158.

## CHAPTER X.

### LIMITATIONS.

As soon as a Colony was granted a legislature either by Imperial enactment or by virtue of the royal prerogative, that legislature assumed supreme control within its own territorial limits for the government of the inhabitants (*a*). But, although within their own sphere plenary (*b*), there were imposed on the legislative powers of the Dominion Parliaments certain restrictions. These restrictions may be classed under three headings, as follows:—

(1) those arising from the essential character of a Parliament of a Dependency as not sovereign in the full legal sense of the term;

(2) those arising from what is termed territorial limitations; and

(3) those arising from the full and unfettered legal sovereignty of the Imperial Parliament in the sense that no Dominion Parliament may pass legislation which is repugnant to an Act of the Imperial Parliament.

The first of these headings may be said to embody the doctrine that there were certain *matters so Imperial* that they were beyond the jurisdiction of any Dominion legislature. When the South African Colonies formed a Union, all owed their position to letters patent, and it could not be maintained that the need for an Imperial Act to effect a Union was due to existing Imperial legislation. It was clear that the need was based simply on the essential position that a Colony could not alter its colonial status by becoming part of a Federation or a Union, and that no concert of neighbouring colonies could

(*a*) *Kelley* v. *Carson* (1842), 4 State Trials (New Series), p. 669.
(*b*) *Powell* v. *Apollo Candle Co.* (1885), 10 Appeal Cases, p. 282.

produce this effect (*c*). Further, a colonial legislature could not extinguish itself; nor abolish the Governor-General; nor pass an Act placing itself under the sovereignty of a foreign Power; nor an Act of secession; nor might it enact that the enemies of Great Britain should not be regarded as enemies of the Dominions (*d*); nor legislate in a manner restricting the King's prerogative in his political capacity, such as sovereignty, perpetuity and perfection (*e*). If the royal prerogative was to be affected, this had to be accomplished by an Imperial Statute (*f*); as also any of the modifications just mentioned. It has been held that it was simply impossible for a colonial legislature to affect a right of the Ordnance (*g*).

Any bill which purported to allow the appointment of a colonial peerage or knighthood, or affecting the prerogative of mercy, or barring appeal to the Privy Council, was beyond the powers of a colonial legislature to enact. Where, also, the Governor-General was required by his instructions to reserve certain classes of bills for the royal assent, it is clear that this duty of reservation could not be subject to local interference (*h*). In general it was probably true that a colonial legislature could do nothing which would have the effect of interposing any barrier between the Governor-General and the Crown, or limiting his discretion in dealing with the Imperial Government (*i*).

The mode of restriction over this class of Dominion legislation was by the reservation of bills by the Governor-General, or some method tantamount to reservation, such as the insertion

(*c*) *Government of South Africa*, Vol. 1, pp. 452—454.

(*d*) Jenkyns, *British Rule and Jurisdiction beyond the Seas*, p. 69.

(*e*) Chitty on the *Prerogative*, p. 25.

(*f*) *Nadan* v. *The King* (1926), Appeal Cases, p. 491; see Commonwealth of Australia Act, 1900, s. 74; South Africa Act, 1909, s. 106.

(*g*) *Tully* v. *Principal Officers of Her Majesty's Ordnance* (1847), 5 Upper Canada Reports, Queen's Bench, p. 6.

(*h*) Prof. H. A. Smith, *Law Quarterly Review*, Vol. XLIII. p. 380.

(*i*) *Initiative and Referendum Case* (1919), Appeal Cases, p. 935; *Taylor* v. *Attorney-General for Queensland* (1917), Commonwealth Law Reports, p. 474.

of a suspending clause or by the disallowance of completed legislation by the Crown.

The power of the Crown to negative or veto a bill of a Dominion legislature was virtually, though not in name, the right of the Imperial Parliament to limit Dominion independence, and has been frequently exercised. When a Governor-General reserved a bill for the consideration of the Crown, the bill did not become law until it had received the royal assent, which was in effect the assent of the Imperial Ministry, and therefore indirectly of the Imperial Parliament. In 1868 the Crown refused assent to a Canadian bill reducing the salary of the Governor-General (*k*); and the Crown has at times passed a veto upon Australian Acts for checking Chinese immigration. In 1884 a New Zealand bill was vetoed which proposed to authorise the Dominion to annex any island in the Pacific that was not claimed by any foreign Power. In 1928 the South African liquor bill was reserved for the royal assent as it affected the rights of the Native and Asiatic population (*l*).

But although the Governor-General had given his assent in the name of the King to a bill, the Crown itself had in point of fact a second veto. A copy of all statutes assented to by the Governor-General has to be transmitted to the Secretary of State for the Dominions, and the King in Council might within two years of the receipt of it, disallow any such Act (*m*). This power of disallowance has not been exercised by the British Government for more than fifty years, and, while it still has a legal existence, it may be regarded as constitutionally dead (*n*). Therefore, this chapter has generally been accorded the past tense; for this right of veto is an example of how a legal right has been modified by a constitutional convention. The right exists, but its exercise would be unconstitutional. It would be regarded, especially now that the King is the Head of each Dominion separately, as an interference by the Imperial

(*k*) Todd, *Parliamentary Government in the British Colonies*, p. 137.
(*l*) *Union Statutes*, Act 30 of 1928.
(*m*) Todd, *ibid.* p. 144.
(*n*) Sir Robert Borden, *Canadian Constitutional Studies*, p. 66.

Government in the internal affairs of the Dominions. Such an interference, it has been pointed out, would not be tolerated. The sanction of this convention not to veto Dominion legislation is the same as the sanction of law, namely, public opinion, and in the last resort, force.

Whereas the right of veto is a matter of Imperial policy, and, if not exercised, a Dominion Act has the force of law, hardly open to nullification by the decision of a Court of law, the restriction of legislation to the territorial limits of a Dominion is a matter of law of which the courts will take cognizance.

In the celebrated case of *MacLeod* v. *Attorney-General for New South Wales* (*o*), it was emphatically laid down that the jurisdiction of a colonial Parliament is confined to its own territory. An Act of New South Wales provided that whosoever being married marries another person during the subsistence of the first marriage, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years. A certain MacLeod, during the subsistence of his first marriage in New South Wales in 1872, married again in the United States of America in 1889. When he returned to New South Wales he was arrested and convicted of bigamy. In an appeal to the Privy Council it was held that the enactment in question applied only to those persons who were within the territorial limits of the Colony when the offence was committed. This decision has been followed in a case almost identical in New Zealand, where the first marriage took place, while the crime of bigamy was committed in England (*p*).

It is difficult to defend these decisions on legal or moral grounds. Both the accused were held to be unpunishable in the country of the first marriage, where the first wife was left suffering a wrong and probably a charge or burden to the authorities. In both cases the accused had not relinquished their domicile or nationality; in both cases they wronged society

(*o*) (1891), Appeal Cases, p. 455.
(*p*) *Rex* v. *Lander* (1919), New Zealand Law Reports, p. 305.

in general. If England punishes crimes of this nature on the moral grounds on which these decisions are attacked, it seems not only illogical, but immoral, that the Dominions should be prevented from doing likewise. There is nothing to prevent a Dominion from attaching civil consequences within its jurisdiction to acts transacted beyond its borders; this seems quite clear from judicial decision (*q*), so that there is no logical reason for denying the competence of a Dominion legislature to attach penal consequences within their own territories to criminal acts committed abroad (*r*).

Also, a Dominion can only tax something within its territorial borders. If shares upon which dividends are declared are clearly situated in England they cannot be taxed by a Dominion. Legislation purporting to tax dividends on such shares is *ultra vires* (*s*). When a foreign company carries on all its business within the territorial limits of a Dominion and makes all its profits there, it does not seem immoral to allow that Dominion to tax such profits.

The time has arrived for the amendment of this restriction. Extra-territorial legislation may in many cases be necessary for the peace, order and good government of a Dominion. It should be made quite clear that the Parliaments and not the Courts should decide on the validity of such legislation. Otherwise every attempted exercise of legislation will be open to challenge in the Courts, a result which is wholly contrary to the doctrine of equality with the United Kingdom, whose legislation, if expressed to operate extra-territorially, is binding on every Court in the British Dominions.

(*q*) *Ashbury* v. *Ellis* (1893), Appeal Cases, p. 339.

(*r*) See able articles by Prof. H. A. Smith in *Canadian Bar Review*, Vol. 1, pp. 338—350; and by Sir John Salmond, *Law Quarterly Review*, Vol. XXXIII. pp. 117—131; and by Prof. H. A. Smith on the *Legislative Competence of the Dominions*, in the *Law Quarterly Review*, Vol. XLIII. p. 380.

(*s*) *Brassard* v. *Smith* (1925), Appeal Cases, p. 371; *Pass* v. *British Tobacco Co.* (*Australia*), *Ltd.*, 42 Times Law Reports, p. 771. See also *Spiller* v. *Turner* (1897), 1 Chancery, p. 911; *Indian Investment Co.* v. *Borax, &c.* (1920), 1 King's Bench Reports, p. 539. In private international law a contract cannot be varied by the legislation of a foreign country.

In various instances Imperial Acts have given extended powers of legislation to Dominion Parliaments. Sometimes the Imperial Act authorises a colonial legislature to make laws on a specified subject with extra-territorial operation (*t*); sometimes an Act of the colonial legislature is given the force of law throughout the British Empire (*u*). What is required, however, is an Act of the Imperial Parliament granting the Dominion Parliament legal powers equal to that of the Imperial Parliament. The necessity for such an Act will be seen in the following chapter, which discusses the third restriction based on the doctrine of repugnancy to an Act of the Imperial Parliament. Until such an Act is passed, the Dominions cannot in law be said to be equal in legislative power to Great Britain. But this inequality does not affect the status of the Dominions; for the Dominions are at liberty to adjust this inequality. That they take a considerable time to do so, or do not do it at all, is merely a matter of convenience, of understanding, of consent. It does not affect Dominion sovereignty in the political sense.

(*t*) Merchant Shipping Act, 1894, ss. 478, 735, 736.

(*u*) Jenkyns. *British Rule and Jurisdiction beyond the Seas*, p. 70.

## CHAPTER XI.

### THE DOCTRINE OF REPUGNANCE.

The history of one of the most important of all Imperial enactments reads like a tale of wonder, and depicts how the opinions and acts of one stubborn man in a position of influence and power may throw into confusion the well-regulated organisation of a whole nation. In the middle of the last century there was appointed as judge of the Supreme Court of South Australia a gentleman of firm, if somewhat unreasonable, views, the Honourable Mr. Justice Boothby. On taking his seat on the bench he began to enunciate a series of startling doctrines. He held that his Court was called upon to examine the validity of all the statutes which it was required to interpret. This in its place and in its time is a very proper and correct procedure, but the Australians did not regard it so when his lordship attacked the validity of the constitution itself (*a*) on a number of grounds. Even though the two Houses of Parliament passed an address for his removal from the bench for repeated legal bombshells, sometimes styled gross incompetency, the learned judge persisted in his views. Nor were there men of high standing and authority who did not agree with his lordship. The Law Officers of the Crown in England upheld the judge on a point of cardinal importance: they held that the Electoral Law of 1856, under which the Legislative Council and the House of Assembly were elected, should have been reserved under an Imperial Act (*b*), and that, therefore, all the Acts passed by these bodies were invalid. Mr. Boothby gazed in triumph on the havoc caused by his merciless logic. Everywhere, wherever

(*a*) Act No. 2 of 1855-56.
(*b*) 13 & 14 Viet. c. 59, s. 32.

men acted by virtue of the provisions of the laws passed by the bodies which owed their existence to the Electoral Law of 1856, they acted illegally. The laws of South Australia were in a state of unutterable confusion, and the legislators in a state of perplexity, until the Imperial Parliament hastily passed an Act (*c*) to validate *ex post facto* the laws of South Australia.

Mr. Justice Boothby's searching analysis of constitutional proprieties had considerably embarrassed both the Australian and the Imperial authorities. An Act was therefore passed reciting that doubts had been entertained respecting the validity of diverse laws purporting to have been enacted by the legislatures of certain of Her Majesty's Colonies, and respecting the powers of such legislatures, and that it was expedient that such doubts should be removed. This Act was the Colonial Laws Validity Act of 1865 (*d*). Its main provisions are of such importance as to deserve verbal citation:—

"Sect. 2. Any Colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the Colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

"3. No Colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid."

The obvious meaning of this Act is to forbid the local legislature to enact any law repugnant to an Imperial statute, but it does not otherwise derogate from the general powers of Colonial legislatures (*e*). With the passing of this Act the

(*c*) 25 & 26 Vict. c. 11.

(*d*) 28 & 29 Vict. c. 63. See on this enactment, Jenkyns, *British Rule and Jurisdiction beyond the Seas*, pp. 71, 72.

(*e*) *Rex* v. *Marais* (1902), Appeal Cases, p. 51.

condition of non-repugnancy to the general principle of English law disappeared for good (*f*). The Colonial law that is challenged under the Act cannot be repugnant to the law of England, unless it involves, either directly or ultimately, a contradictory proposition, probably contradictory duties or contradictory rights (*g*). Moreover, a Colonial statute is not void for repugnancy to the law of England unless it is opposed to some Act of the Imperial Parliament made expressly binding and applicable to the Colony (*h*). It is a fundamental principle of Imperial constitutional law that an Imperial Act has, save where expressly extended beyond the limits of the United Kingdom, no extra-territorial effect (*i*).

'The Colonial Laws Validity Act is inconsistent with the conception of a self-governing Empire which has arisen since 1863. Its existence imposes fetters on Dominion legislation which are actually inconvenient and even unjust to some of the citizens of the Dominions (*k*). The time has now arrived when this Act should be repealed (*l*).

(*f*) In Australia, in the case of *Rex* v. *Whelan*, decided in 1868, repugnancy to some of the leading principles of the English Common Law was held to invalidate a Colonial Act. This decision is clearly wrong.

(*g*) *Queensland Attorney-General* v. *Commonwealth Attorney-General* (1915), Commonwealth Law Reports, p. 148.

(*h*) *Robinson* v. *Reynolds*, Macassey's New Zealand Reports, p. 562.

(*i*) An instructive example of the application of an Imperial Act to the British Dominions is provided by the British Nationality Acts of 1914—1922. Sect. 9 (1) of the 1914 Act (4 & 5 Geo. 5, c. 17), as amended by the 1918 Act (8 & 9 Geo. 5, c. 38), reads as follows:—"This part of this Act shall not have effect within any of the Dominions . . . unless the legislature of that Dominion adopts this part of this Act." The rules laid down by these British Nationality Acts cannot, on the ground of repugnancy, be varied by Dominion legislation. (See Keith in *Journal of Comparative Legislation*, 3rd Ser. Vol. IX. Pt. 1, p. 128.)

(*k*) See article by Prof. H. A. Smith, *Law Quarterly Review*, XLIII. p. 423. "In practice the restrictions thus imposed have proved to be of considerable importance, for there are a large number of English statutes which expressly extend to the Empire as a whole, with the result that the ground which they cover is removed from the jurisdiction of the Colonial Legislatures. Exemptions by statute have been made in the copyright,

(*l*) For note, see next page.

It was suggested at the 1926 Imperial Conference that in future uniformity of legislation as between Great Britain and the Dominions could best be secured by the enactment of reciprocal statutes based upon consultation and agreement (*m*). The legal restrictions imposed by Imperial statutes, and by the principle of territorial limitation, require close scrutiny and

marriage and other laws to the rule laid down in the second section of the Colonial Laws Validity Act. But this is clearly a very unsatisfactory method of handling a question of such high constitutional importance, and the time is now ripe for laying down a new rule which will not call for a multitude of exceptions." For the Dominion's Admiralty jurisdiction, see Colonial Courts of Admiralty Act, 1890; Merchant Shipping Act, 1894, Sea Regulations, 1910; the case of *The Camosun* (1909), Appeal Cases, 597; *Crooks* v. *Agricultural Union* (1922), Appellate Division of South Africa, 423; *The Woron Case* (1927), Appeal Cases, p. 906; Maritime Conventions Act, 1914; Carriage of Goods by Sea Act, 1924, &c.

(*l*) Keith (*Responsible Government in the Dominions*, 2nd Ed. p. 1229) considers that this Act cannot be swept away without leaving the British North America Act and the whole constitution of Canada without protection, and the relations of the Irish Free State with Great Britain would, he considers, be thrown into confusion without it. But in each of these cases the position can quite easily be adjusted. A provision could be inserted in the Canadian constitution enabling it to be amended by the Canadian Parliament in the same manner as the South African or Australian Commonwealth constitutions are amended. In this respect there arises an interesting point of interpretation. In Australia it has been held that the Colonial Laws Validity Act makes every constitutional alteration a matter of more moment than a mere change in an ordinary law. Although no form is necessary to be observed in altering the constitution, it was always necessary that a Colonial constitution should be altered expressly; it was never possible to alter such a constitution merely by an ordinary Act which, incidentally, enacted provisions which were in conflict with the constitution; the constitution is a solemn matter requiring formal change. The mere enactment of provisions inconsistent with the constitution did not repeal or alter the constitution to the extent of the inconsistency. (*Cooper* v. *Commissioners of Income Tax, Queensland* (1907), 4 Commonwealth Law Reports, p. 1304.) A view directly contrary, supported by *McCawley* v. *The King* (1920), Appeal Cases, p. 601, has been taken in South Africa. Parliament may impliedly repeal or alter a term of the constitution by enacting a provision inconsistent with such term. (*Freeman* v. *Union Government* (1926), Transvaal Provincial Reports, p. 638.) On this subject see Dicey, *Law of the Constitution*, p. 105; the Australian constitution requires amending Acts to amend expressly and not impliedly.

(*m*) *Inter-Imperial Relations Report*, IV. (c), (d).

investigation before they can be brought into harmony with the declared constitutional position of the Dominions. But it is wrong to look at these questions as concerned with cases of inequality indicative of the subordination of the Dominions. In so far as they do involve inequality, it is an inequality depending upon the free consent of the Dominions, and it is admittedly within the rights of the Dominions to have these inequalities adjusted. The question of status is not thereby affected (*n*).

(*n*) General Hertzog, *Union Hansard*, March 8, 1928; and Chapter II., *supra*.

## CHAPTER XII.

### THE KING'S REPRESENTATIVE.*

THE high political position of the Governor-General is treated with scant respect by the law. The Viceroy of India, for example, is really *in loco regis*, in the place of the King. He is no more answerable for his actions than the King himself; and any aggrieved subject must seek a remedy against a subordinate. An action against him for any official act will be stayed by the Courts on application without examining the colour of the act in question, whether the act was legal or otherwise. But a Governor-General is not exempt from jurisdiction unless he shows he has acted in accordance with law. Any Governor-General, in the same manner as any other official or ex-official charged with committing a breach of official trust anywhere within or without His Majesty's Dominions, may be brought to trial either before any competent British Court in the place where the offence is alleged to have been committed, or in England (*a*). He may be criminally prosecuted for a private act (*b*). He may be sued civilly in any Court (*c*), though he has the satisfaction of knowing that his person is not liable to be taken in execution (*d*). But should the Governor-General, when he is sued, show that the act in question is within his authority, and according to law, the Courts will take no further cognisance of it (*e*). The Governor-General can legally do,

* See on this chapter Keith, *Responsible Government in the Dominions*, 1st Ed. Chap. VI.

(*a*) Official Secrets Act, 1889 (52 & 53 Vict. c. 52), ss. 2, 6.

(*b*) *Rex* v. *Eyre* (1868), Law Reports, 3 Queen's Bench, p. 487.

(*c*) *Hill* v. *Bigge* (1841), 4 State Trials (N. S.), p. 723; 13 English Reports, p. 189; *Mostyn* v. *Fabrigas* (1775), 1 Cowper, p. 161.

(*d*) *Hill* v. *Bigge, supra.*

(*e*) *Musgrave* v. *Pullido* (1819), 5 Appeal Cases, p. 102.

not what the King can do, but what the King has legally entrusted to him, or what is vested in him by Act of Parliament (*f*).

The Crown has vested in the Governor-General all the powers necessary for the conduct of the executive Government of the Dominion. He may exercise the prerogative granted under the letters patent and the Royal instructions; his authority is limited to the powers conferred on him by his Commission. And all these powers are further subject to the restrictions imposed by the constitutional practice (*g*) and the law (*h*) of the Dominion of which he is the Governor-General. It is time that the law was altered to make it more in consonance with the high position occupied by the Governor-General. He should be a Viceroy.

There are certain prerogatives which the Governor-General has no power to exercise. He may not grant Royal Charters of Incorporation; nor may he confer honours (*i*); nor declare war or peace, or make treaties without special authority. He cannot create legislative bodies or Courts of law. The prerogative of coinage is also excluded, but this has now become a statutory power regulated by Acts of the Dominion Parliaments. It is, however, possible to empower the Governor-General to exercise all these powers by special Imperial legislation (*i*).

Politically, the position of the Governor-General has undergone some change since the 1926 Imperial Conference. Up to

(*f*) The Governor-General is in an inferior position in the eyes of the law to any ordinary ambassador of some insignificant State. For an ambassador is not subject to the Courts at all: *Mattueof's Case,* 88 English Reports, p. 598; nor is his staff: *Engelke* v. *Musman* (1928), Appeal Cases, p. 433.

(*g*) *Commercial Cable Co.* v. *Newfoundland Government* (1916), 2 Appeal Cases, p. 610; *Faure* v. *Colonial Secretary* (1880), Foord's Reports (South Africa), p. 82; *Cameron* v. *Kyte* (1835), 12 English Reports, 678; 3 State Trials (N. S.), p. 607; *Musgrave* v. *Pullido* (1819), *supra*.

(*h*) *Cook* v. *Attorney-General* (1909), 28 New Zealand Law Reports, p. 405.

(*i*) *Attorney-General for Dominion of Canada* v. *A.-G. for Province of Ontario* (1898), Appeal Cases, pp. 247, 252.

that time he occupied a dual position. The essential features of responsible government, as stated by Durham, were the division between Imperial and local matters, and the disposal of the latter to the Dominion legislature. Imperial concerns were to be retained absolutely by the British Government. The Governor-General's functions were divided along similar lines. In Imperial matters he was without doubt an Imperial officer (*k*), in domestic matters a local constitutional monarch.

When the Governor-General exercised the prerogative of dissolving Parliament, he acted, not as an Imperial officer in Imperial interests, but in the interests of the Government of which he was the head. It is confusing to compare such action with action in opposition to Ministers taken on Imperial grounds. For the Governor-General was obliged to act according to the instructions of the Secretary of State for the Colonies; he was called upon to do so by the instruments which created his office and appointed him Governor-General. He obeyed the Secretary of State as the mouthpiece of the Imperial Government; and the instructions given by the Imperial Government have in many cases placed the Governor-General in opposition to his own Ministry. The Imperial instructions have always been based on some broad Imperial interest. Therefore, whenever the Governor-General differed from his Ministers, he did so on grounds which the Imperial Government believed it its

(*k*) The Governor-General has to perform many duties as a mandatory of the Imperial Parliament. He is given a great variety of powers with regard to British shipping by the Merchant Shipping Act, 1894, ss. 84, 90, 205, 336. He is also the authority for many acts under the Fugitive Offenders Act, 1881, and the Extradition Acts, 1870 (s. 17) and 1873 (s. 1). His authority is required for a prosecution of foreigners under the Territorial Waters Jurisdiction Act, 1878. He has duties under the Army Act, 1881 (ss. 54, 89, 94, 131, 132); under the Colonial Courts of Admiralty Act, 1890 (s. 9), and many other Acts. In all these cases there is no doubt that the Governor-General can legally act without the advice of Ministers at all. But it is known that in practice he does consult his Ministers, for it is on them that the real burden would fall of deciding whether or not a fugitive criminal whose extradition is being asked for should be handed over. As High Commissioner, the Governor-General is expected to manage on his own responsibility.

duty in the interest of the whole Empire to maintain. As an Imperial officer the Governor-General acted as the channel of communication between the British and Dominion Governments, keeping the former in touch with, and representing its wishes to the latter. Hence the spectacle of a Governor-General dutifully accepting the policy of his constitutional advisers, whilst at the same time writing hurried despatches to the British Government informing it of such policy, and perhaps suggesting that it should bring pressure to bear to secure its modification in certain particulars where it might affect Imperial interests.

The Governor-General might, on Imperial grounds, have dissolved Parliament; on Imperial grounds he might have refused a dissolution. "Beware of to-morrow," Mr. Bourassa, the brilliant Canadian nationalist, warned his constituents after Lord Byng's refusal to dissolve Parliament, "beware," he said, "of to-morrow, if you allow a Governor-General, a subaltern of the British Government, to accord and refuse dissolution as he well likes; you will wake up to find that Downing Street will be the judge in Canada's political matters."

On this issue the general election in Canada during 1926 was fought. Lord Byng, acting on his own authority without instructions from the British Government, refused to dissolve the Canadian Parliament when advised to do so by the Prime Minister. He appears to have thought that His Majesty would have refused dissolution in similar circumstances (*l*). He acted, it may be said, with a conscientious anxiety above and beyond and before all else to do the right thing. Having refused to dissolve the Canadian Parliament, Lord Byng accepted the resignation which the Prime Minister tendered; he called upon the Leader of the Opposition to form a Government. The latter on becoming Prime Minister also advised a dissolution. This time the Governor-General could not very well refuse. During

(*l*) This is where Lord Byng went wrong. His Majesty never refuses a dissolution of Parliament when so advised, except in the rare instance where a Government had appealed to the people and came back in a minority. For in such a case it is the obvious duty of the Government to retire from office.

the general election which followed there waged a mighty dispute over the interpretation of a constitutional convention. The principle of Dominion self-government rested on the same basis as the self-government of the United Kingdom. It was not found in any statute, or regulation, or judicial decision, but only in the practice which had long obtained at Westminster, and that practice ought to be followed in the Dominions. The Governor-General, from the date of this general election, ceased to be an Imperial officer. He could no longer resist the wishes of the Dominion Ministry. His position in relation to the Dominion Cabinet became altogether similar to the King's position in relation to the British Cabinet. The Crown in Canada meant in effect the Canadian Ministry.

This interpretation of the exercise of the prerogative of dissolution has been recognised by the 1926 Imperial Conference: "It is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain, or of any department of that Government (*m*). . . . It is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs. Consequently, it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion" (*n*).

From July 1, 1928, the Governor-General of the Union began to act exclusively as the representative of His Majesty (*o*). In accordance with the principle laid down above, the Dominion High Commissioners will, in time, have a diplomatic status,

(*m*) *Inter-Imperial Relations Report,* IV. (b).
(*n*) *Ib.* IV. (c).
(*o*) Statement by General Hertzog in Union House of Assembly.

so that they will be able to act directly in connection with the British Government where it is necessary (*o*); and the British Government will appoint diplomatic agents in the Dominions to communicate with the Dominion Governments.

The old idea of the functions of a Governor-General has now disappeared. In the past "a Governor-General appointed by a distant Power," wrote Lowell (*p*), "coupled with a legislature elected by the people, was a contrivance for fomenting dissensions and making them perpetual." In the future the position of the Governor-General, except for the amendments in the legal position suggested in the beginning of this chapter, need not be subject to any further alteration. The participation of the Dominions in foreign affairs can be made fully effective without any change in the existing law, which vests the conduct of these matters in the Crown as part of the royal prerogative to be exercised by the Crown in England (*q*).

(*o*) Statement by General Hertzog in Union House of Assembly.

(*p*) *Government of England,* Vol. II. Chap. VI.

(*q*) Prof. H. A. Smith, *Legislative Competence of the Dominions, Law Quarterly Review,* Vol. XLIII. p. 385.

# Part III.

# EXTERNAL SOVEREIGNTY.

> In sovereignty it is a most happy thing not to be compelled; but so it is the most miserable thing not to be counselled.—*Ben Jonson.*

## CHAPTER XIII.

### THE PRINCIPLE OF CONSULTATION.

By the law the Crown acts as the delegate or representative of the State in the conduct of foreign affairs, and what is done in such matters by the royal authority is the act of the State, and, according to international law, binding upon the latter without further sanction. The Crown enjoys the sole right of appointing ambassadors, diplomatic agents, consuls and other officers, through whom intercourse with foreign nations is conducted; of making treaties, declaring peace and war, and generally of conducting all foreign relations. Such matters are entrusted to the absolute discretion of the Sovereign acting through the recognised constitutional channels upon the advice of the Cabinet, unfettered by any direct supervision, Parliamentary or otherwise. An indirect means of control is, however, supplied by the customary or conventional law of the constitution relating to the Cabinet system, the doctrine of Ministerial responsibility, and the fear of loss of office or national censure. Moreover, it is recognised as a constitutional maxim or convention that declarations of peace and war and the conduct of foreign relations must be in conformity with the wishes of Parliament, and in certain cases treaties require special Parliamentary sanction. This is the position which governs the foreign relations of each independent Britannic State. Each Britannic State is perfectly free to conduct its own foreign policy, to negotiate its own treaties, and generally to act in relation to foreign States in any way it pleases. But there are still conventions which remain as remnants of the Imperial unity of the past, governing the foreign relations of each Britannic State in such a way as to tend to the maintenance of a common Imperial policy. All these conventions or understandings are based upon the principle that the diplomatic unity

of the Britannic Alliance ought to be maintained. *Understandings* is a better term to use than *conventions*, for these understandings, unlike conventions of the constitution, have no real sanction. If they are not adhered to, there is nothing to force any Britannic State to adhere to them.

At one time the unity of the Empire in foreign affairs was perfect. No foreign Power recognised a Dominion as a political State; no foreign Power approached a Dominion Government to obtain redress for any injury done. When the Vancouver riots in 1907 resulted in damage to Japanese and Chinese property, the formal request for redress was made, not direct to Canada, but to the British Government. In 1905, and in the following years, when the Government of Newfoundland interfered with the fishing rights of the United States, the Government of that country addressed its representations to London. This diplomatic unity of the British Empire prevailed right up to the end of the Great War.

But there had been growing in the Dominions a dislike of definite committal by the Imperial Government. The Dominions, not really menaced by any external militarist danger, instinctively and naturally disliked any system of inter-Imperial relations which seemed to commit them in entanglements in (what Sir Wilfrid Laurier termed) the vortex of European militarism, even though they generally approved of the efforts of Great Britain to maintain peace in Europe. The Dominions wished to escape from the burden of constant international responsibility; they were pre-occupied with their own domestic problems; they were intent on the development of their own empty spaces. The problems of Europe presented no aspect which vitally affected them.

At first the Dominions were content to allow Great Britain to conduct foreign affairs on her own responsibility. Then a demand arose that where the special interests of a Dominion were concerned, no action should be taken until there had been consultation with the Dominion concerned. Thus arose the understanding of consultation. But it soon came to pass that where any matter concerned a Dominion more vitally than even

Britain, that Dominion demanded a liberty of action in such region equivalent to the liberty of action of Britain in Europe. The Dominions resented the interference of the British Foreign Office in those regions of international politics in which they alone were concerned. There thus arose a conflict of interests.

The British Government in London always thinks more about quiet and co-operation throughout its vast field of contacts than the particular interests of any particular Dominion; while the Dominions are really more concerned about being left out of international affairs, unless their own interests are directly affected, when they wish to manage them in their own way. They will no longer assume obligations in which they have no interests; but Great Britain, with her wide and complex connections, cannot limit her engagements to what the Dominions will accept. Each Britannic State, therefore, finds no alternative but that of complete liberty and independence of action in foreign affairs. The diplomatic unity of the Empire is thus no longer a fixed and immutable principle. But there is still a generally prevailing desire that there should be a joint Imperial foreign policy.

At the first meeting of the Imperial War Cabinet of 1917, it was agreed that the policy of the British Empire should be one, and should be the outcome of consultation between the six Governments of which the Imperial War Cabinet was composed. Since the Peace Conference it has been a primary axiom of British external policy that the British Government could not enter into engagements of Imperial concern without the consent of the other Britannic States. The failure by the British Government to act in accordance with this understanding was the cause of the controversies about Chanak and the Lausanne Treaty. But however desirable such a state of affairs might be, the difficulty arose as to how a Dominion should act if it could under no circumstances accept a treaty or obligation accepted by the rest of the Empire. The solution was provided in the Locarno Treaty. This treaty was an abrupt departure from the theory of diplomatic unity enunciated by the Imperial War Cabinet in 1917. It was a departure in

favour of the system contemplated in the draft Anglo-American Treaty of Guarantee to France in 1919, never actually brought into force. The system contemplated in 1919 was that Great Britain, in matters affecting Europe even of the first importance, will proceed, no doubt after giving all information possible by cable and despatch, to negotiate treaties which were to be binding on herself, but which would impose no obligation on any Dominion unless the Dominion afterwards ratified the treaty. Article 9 of the Locarno Treaty provided that: "The present treaty shall impose no obligation upon any of the British Dominions, or upon India, unless the Government of such Dominion, or of India, signifies its acceptance thereof."

Though the Locarno system was severely attacked, it has now prevailed and it is the procedure by which the foreign relations of the Empire are conducted. But the understanding or the principle of consultation is not abandoned. The Inter-Imperial Relations Report contains the following important paragraph (*a*): "It was agreed in 1923 that any of the Governments of the Empire contemplating the negotiation of a treaty should give due consideration to its possible effect upon other Governments, and should take steps to inform Governments likely to be interested of its intention.

"This rule should be understood as applying to any negotiations which any Government intends to conduct, so as to leave it to the other Governments to say whether they are likely to be interested.

"When a Government has received information of the intention of any other Government to conduct negotiations, it is incumbent upon it to indicate its attitude with reasonable promptitude. So long as the initiating Government receives no adverse comments, and so long as its policy involves no active obligations on the part of the other Governments, it may proceed on the assumption that its policy is generally acceptable. It must, however, before taking any steps which might involve the other Government in any active obligations, obtain their definite assent."

(*a*) Paragraph V. (a).

The present position is a direct consequence of the theory of full ministerial responsibility in the Dominions. If it was open to a Dominion Government to reply to a request from Britain for redress to a foreign State with the answer that the Ministry would not accord it, but would resign, and that no other Ministry would take office, there was at once an end to the unity of the Empire, for the only alternatives before the Empire in the long run was either to acknowledge a common superior State, or to dissolve into fragments, which, however united, ceased to be one State. But, again using the words of Keith (*b*): "If it is the duty of a Dominion not to adopt the policy of a California and defy Imperial obligations, it is no less the duty of the British Government to see that no action of its shall run counter to the interests of a Dominion; nor in truth can the British Government be fairly charged with lack of appreciation of this view. The fact that Canada and the other Dominions respect the obligations of treaties as religiously as the Imperial Government itself is indeed a good augury for the future of the Empire."

In conclusion, it may be said that the position of the Britannic States in foreign relations generally is no different from that of sovereign States outside the Empire, except that each Britannic State informs the others constantly as to the trend of foreign events, and invites from them by this friendly gesture of voluntary information any representation they may wish to make. It is this principle or understanding of consultation on matters of joint interest that binds the Britannic States into a Britannic Alliance; it is the maintenance of this principle and the carrying out of this understanding that will make for the strength of the Empire. "Mutual good feeling, community of interest, and abstention from pressing rightful claims to their logical conclusion," can alone make the Commonwealth, as an association of free Nations, persist and flourish when all Empires based on the subjection of individual States have ceased to be possible.

(*b*) *Responsible Government in the Dominions*, p. 283 (1st Ed.).

## CHAPTER XIV.

### THE SYSTEM OF CONSULTATION (*a*).

The representatives of the Britannic States and India meet at intervals of about four years to discuss or consult on questions affecting the Empire. "They meet there on terms of equality under the presidency of the first Minister of the United Kingdom. They meet there as equals; he is *primus inter pares;* Ministers from six nations sit around the council board, all of them responsible to their respective Parliaments and to the people of the countries which they represent. Each nation has its voice upon questions of common concern and highest importance as the deliberations proceed; each preserves unimpaired its perfect autonomy, its self-government, and the responsibility of its Ministers to its own electorate."

In these words of Sir Robert Borden can be seen the real reason of the impotency of the Imperial Conference. It has no power, for it has no instrument for executive action. It can do nothing more than recommend; and any Dominion that chooses to pursue some particular interest of its own, and to disregard the recommendations of the Conference, can do so with impunity.

The Conference has only an indirect influence on the legislative and executive bodies of the States represented there. If its resolutions are to have any effect at all, they must be carried unanimously. Up to now it has only once carried a resolution otherwise than by unanimity. That was the Indian resolution of 1921, to which South Africa was the only dissentient. General Smuts then expressed the view that it was of fundamental importance that none but unanimous resolutions

(*a*) See on this chapter an article by Prof. Kenny, 2 *Cambridge Law Journal,* 1926, p. 306.

should be carried. If the Conference could not be unanimous about any resolution, it should not pass that resolution.

But even when a resolution is passed unanimously it may still fail to be ratified. As Mr. Baldwin said, on November 9, 1923: "The purpose of the Imperial Conference is not to frame absolute and binding resolutions. The conclusions reached are naturally subject to any action which may be taken later on." At the Economic Conference of 1923, sitting in conjunction with the Imperial Conference, a scheme was devised and unanimously approved of granting a limited measure of Imperial preference. All the representatives pledged themselves to submit this scheme to their respective Parliaments for adoption; but before most of the Dominion representatives had reached their native shores, a general election in Britain brought a new Government into office with a policy directly in opposition to that of granting preferences. The pledge of submitting the scheme to Parliament was fulfilled; but Parliament refused to adopt the proposal, for the general election was fought and lost on that issue.

The risk of the non-ratification of the resolutions is the greater because the Premier whom each Dominion sends as its representative is a party leader, though at the Imperial Conference he represents, not his own party, but his whole country, yet he cannot rely on the support of any party but his own. It will undoubtedly add much to the value of any future Imperial Conferences if it can be found practicable for each Premier to be accompanied by some trusted member selected by the opposition. The bitterness of political strife should not interfere with such an amicable companionship (*a*).

The Imperial Conference meets at long intervals. No machinery for continuous consultation to deal with urgent matters as they arise has yet been devised, except that Mr. Baldwin, on November 20, 1924, on taking office as Premier, said that he would periodically assemble the Dominion High Commissioners in London to meet himself, the Foreign Secre-

(*a*) Prof. Kenny, 2 *Cambridge Law Journal*, 1926, p. 307.

tary and the Colonial Secretary, so as to keep the Dominions authoritatively informed of the progress of foreign affairs.

The long intervals between the Imperial Conferences make a system of continuous consultation and communication of special importance. It is desirable to arrange a closer personal touch between Great Britain and the Dominions, and between the Dominions *inter se* (*b*). Such contact alone can convey an impression of the atmosphere in which official correspondence is conducted. A new system of consultation is required.

"By reason of his constitutional position," declares the Inter-Imperial Relations Report, 1926 (*c*), "the Governor-General is no longer the representative of His Majesty's Government in Great Britain. There is no one, therefore, in the Dominion capitals in a position to represent with authority the views of His Majesty's Government in Great Britain. . . .

"The Governments represented at the Imperial Conference are impressed with the desirability of developing a system of personal contact, both in London and in the Dominion capitals, to supplement the present system of inter-communication and the reciprocal supply of information on affairs requiring joint consideration. The manner in which any new system is to be worked out is a matter for consideration and settlement between His Majesty's Governments, with due regard to the circumstances of each particular part of the Empire, it being understood that any new arrangements should be supplementary to, and not in replacement of, the system of direct communication from Government to Government, and the special arrangements which have been in force since 1918 for communications between Prime Ministers."

(*b*) The Dominions have never claimed for themselves a right to offer even advice about the Crown Colonies. This right was distinctly denied at the Imperial Conference of 1923, when the Duke of Devonshire, then Colonial Secretary, said: "The Colonies and Protectorates are the immediate responsibility and trust of the British Government." The Irish Free State representative added that "the Dominions are independent sovereign countries, and the Imperial Conference has no right to interfere with them. The Mandated Territories and Protectorates which are controlled by the British Government give no responsibility to the Imperial Conference."

(*c*) Paragraph VI.

## CHAPTER XV.

### TRADE RELATIONS AND COMMERCIAL TREATIES (*a*).

THE Dominions have long possessed the undisputed control of their own internal affairs. But one cannot draw an absolute line between what is domestic and what is foreign. In 1859 the United Provinces of Upper and Lower Canada passed an Act for a protective duty on foreign goods, including those coming from Great Britain. This, of course, affected not only the people of Canada, but also that of the Empire as a whole, as well as foreign countries. In spite, however, of the strenuous opposition of British manufacturers, the Imperial Government consented to the imposition of a tariff, and the right of a self-governing Colony to place a tariff on both foreign and British goods was thereby established. In 1854 a reciprocal trade treaty between Canada and the United States had already been concluded, but this treaty did not affect British interests, and it was left unchallenged. It, however, formed a precedent, and together with the Act of 1859 established the principle of leaving the self-governing Colonies free to manage their own trade relations.

But this right of controlling their own commercial relationship with the outside world had always been subject to an important reservation or understanding. The Colonies had outgrown the condition in which each of them could be regarded as an isolated community. Trade ramifications became too complicated not to be affected by any single treaty. An understanding arose that in any commercial treaty in which a Britannic State took part, the other Britannic States not parties to the treaty, should always receive an equal favoured-nation-

(*a*) See article by A. L. Lowell, *Foreign Affairs*, April, 1927, p. 379.

treatment with any other nation. No foreign country was to receive more favourable concessions than any of His Majesty's Dominions might receive.

From the very first Great Britain regarded it essential that any tariff concessions conceded by a Dominion to a foreign country should be extended to the United Kingdom and to the rest of His Majesty's Dominions. When Newfoundland in 1890 had made arrangements for a treaty with the United States which would have accorded preferential treatment to that Power, the Secretary of State for the Colonies, in a despatch of March 26, 1892, informed the Government of Canada, in reply to its protest, that it might rest assured "that Her Majesty will not be advised to assent to any Newfoundland legislation discriminating directly against the products of the Dominion."

In 1894 the Colonial Conference held at Ottawa laid down the principles which were to apply to commercial treaties. These principles were reiterated by the Colonial Secretary, Lord Ripon, in a dispatch dated June 28, 1895:—

"Any agreement made must be an agreement between Her Majesty and the Sovereign of a foreign State, and it would be to Her Majesty's Government [*in the United Kingdom*] that the foreign State would apply in case of any questions arising out of the agreement. To give the Colonies power of negotiating treaties for themselves without reference to Her Majesty's Government would be to give them an international status as separate and sovereign States, and would be equivalent to breaking up the Empire into a number of independent States, a result injurious equally to the Colonies and to the Mother Country, and one that would be desired by neither party. The negotiations, therefore, between Her Majesty and the foreign Sovereign must be conducted by Her Majesty's representative at the foreign Court, who would keep Her Majesty's Government informed of the progress of the discussion, and seek instructions from them as necessity arose. In order to give due help in the negotiations, Her Majesty's representative should, as a rule, be assisted by a delegate, appointed by the Colonial Government, either as plenipotentiary or in a subordinate

capacity, as the circumstances might require. If, as a result of the negotiations, any arrangements were arrived at, they would require approval by Her Majesty's Government and by the Colonial Government, and also by the Colonial legislature if they involved legislative action, before the ratification could take place. This procedure has been in the past adopted, and Her Majesty's Government had no doubt as to its propriety, as securing at once the strict observance of existing international obligations, and the preservation of the unity of the Empire."

Since 1894 the Dominions have moved onward in their commercial relations. They now negotiate commercial treaties by dealing direct with the foreign country concerned. The United States deals directly with Canada in commercial matters, and so does Portugal with South Africa, while the recent trade agreement between Germany and South Africa was entered into without the interference of Great Britain.

It is true that in the past Great Britain has intimated that she would not agree to a Colony asking from foreign Powers concessions hostile to the interests of other parts of the Empire (*a*). If, therefore, a preference were sought by or offered to a Dominion in respect of any article in which a foreign country competed seriously with other portions of the Empire, the British Government would feel it to be a duty to use every effort to obtain an extension of the concession to the rest of the Empire. But this understanding has been carefully observed by the Dominions in commercial negotiations affecting the trade of the Dominions. All concessions made to foreign Powers have always been extended to all parts of the Empire (*b*).

In general, no distinction is made in the rules governing commercial treaties and political treaties as laid down in the previous chapters in regard to the principle of consultation.

(*a*) *Parliamentary Papers,* 1910, House of Commons, 129.
(*b*) See Union-German (draft) Treaty, 1929, clause 8.

## CHAPTER XVI.

### BINDING FORCE OF IMPERIAL TREATIES ON THE DOMINIONS (*a*).

BECAUSE legally the Crown has the absolute power of concluding treaties, and has in the past always been advised by the British Government, there has been no case known in which any treaty proper has been made without the consent of the British Government. Treaties made by the Crown were binding upon the Colonies whether such treaties were ratified by the Colonial Parliaments or not.

Prior to 1882 all treaties concluded by the Crown *ipso facto* applied to the Colonies. In 1882 a treaty was entered into between Great Britain and a country hardly as large as an insignificant South African magisterial district, which contained the first Colonial Clause, a clause permitting the self-governing Colonies to adhere to the treaty within a fixed period (*b*). The right of separate withdrawal from a treaty on the part of a Colony first appeared in 1889.

The separate adherence to and withdrawal from treaties was at first considered possible only where a differentiation of treatment could be based upon a differentiation of locality. The practice of consulting the Colonies was not introduced in political treaties of general or world-wide application; nor, indeed, had the Colonies put forward any formal claim right up to the time of the Great War to be given an option as to adherence in the case of general political treaties. Yet where Dominion interests were directly affected in a regional treaty, it had become a fixed rule that the Dominion Government

(*a*) See on this chapter Keith, *Responsible Government in the Dominions*, 1st Ed. pp. 1108 *et seq.*

(*b*) Treaty with Montenegro, 1882.

concerned should be consulted. In the General Arbitration Treaties with the United States in 1908 and 1911, Great Britain expressly reserved the right to obtain the concurrence of any Dominion whose interests were directly affected by the treaty.

Ratification of a treaty, in the absence of special agreement to the contrary, has become requisite by usage whenever a treaty is concluded by representatives accredited for the purpose. Ratification may be withheld for various reasons, such as when the constitution of a State requires a treaty concluded by plenipotentiaries to be sanctioned by an elected or appointed body, as the Senate in the United States. In such cases it is an implied condition of negotiations that an absolute right of rejecting a treaty is reserved to the body the sanction of which is needed. It is now the practice to make an express reservation of the right of ratification either in the full powers given to the negotiators or in the treaty itself. Ratifications are signed by the person invested with the supreme treaty-making power (the King in the case of the Britannic States). Article 18 of the Covenant of the League of Nations provides that every treaty or international engagement entered into by any member of the League shall forthwith be registered with the Secretariat of the League, and shall, as soon as possible, be published by it. No such treaty or international agreement is binding until so registered. But in other cases, as soon as ratification is completed, the treaty comes into definite operation.

In the case of the Dominions, most treaties only come into effect on the passing of legislation by the Dominion Parliaments concerned. For example, in 1857, France concluded a treaty with Great Britain regarding French fishery rights in Newfoundland. The Newfoundland Parliament declined to pass legislation ratifying the treaty, and it therefore never came into force.

The Imperial Conference of 1923 laid down certain rules for the ratification of treaties which still hold good:—

"(a) The ratification of treaties imposing obligations on one part of the Empire is effected at the instance of the Government of that part.

"(b) The ratification of treaties imposing obligations on more than one part of the Empire is effected after consultation between the Governments of those parts of the Empire concerned. It is for each Government to decide whether Parliamentary approval or legislation is required before desire for or concurrence in ratification is intimated by that Government."

Parliamentary approval may be signified by resolutions of both Houses of Parliament, or by a resolution of the elected House only. Most treaties require legislation to render them effectual; *e.g.*, a commercial treaty involving tariff concessions would usually require an Act of Parliament to bring the tariff concessions into effect.

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## APPENDIX.

### Ratification of the Versailles Treaty by Canada (*a*).

ORDER IN COUNCIL.

Whereas at Versailles on the 28th day of June, 1919, a Treaty of Peace was concluded and signed on behalf of His Majesty, for and in respect of the Dominion of Canada, by plenipotentiaries duly authorised for that purpose by His Majesty on the advice and recommendation of the Dominion of Canada;

And Whereas the Senate and the House of Commons of the Dominion of Canada have by resolution approved of the said Treaty of Peace;

And Whereas it is expedient that the said Treaty of Peace be ratified by His Majesty for and in respect of the Dominion of Canada.

Now, therefore, the Governor-General-in-Council, on the recommendation of the Secretary of State for External Affairs, is pleased to order and doth hereby order that His Majesty the King be humbly moved to approve, accept, confirm and ratify the said Treaty of Peace, for and in respect of the Dominion of Canada.

(*a*) See *Canadian Sessional Paper*, No. 41, J.

## CHAPTER XVII.

### DIPLOMATIC REPRESENTATION AND THE SIGNING OF TREATIES (*a*).

FORMERLY all acts of the Crown were done by the King on the advice of his British Ministers. They advised the King to appoint delegates to attend a conference with powers limited or otherwise to act for the whole Empire. This practice maintained the diplomatic unity of the British Empire. But, for the Conference on Radio-telegraphy in 1912, the King, on the advice of his British Ministers, granted to each of the Dominion representatives full powers to act separately on behalf of each Dominion alone, apart from the United Kingdom delegates who acted for the whole Empire. Parts of the Empire thus had double representation.

In 1919 the plenipotentiaries of the Dominions and India signed the Peace Treaty under full powers granted by the King on the advice of the British Ministry. But the treaty named only the British Empire as the contracting Power, and made no mention of the Dominions as separate contracting Powers. Accordingly, the treaty would have bound the whole Empire, including the Dominions which signed, even though no Dominion representative had signed it. This was so because there was a single British Empire delegation, and no separate delegations on behalf of the Dominions.

For the Washington Disarmament Treaties of 1921—1922, the United States sent an invitation to Great Britain alone and to no Dominion. But the Dominion representatives attended the Conferences under powers granted by the King on his

(*a*) See on this chapter an article by Prof. Kenny, 2 *Cambridge Law Journal*, 1926, p. 297; Keith, *Responsible Government in the Dominions*, 1st Ed. Chap. V., to whom the author acknowledges his indebtedness.

British Ministers' advice, and they ratified the treaties under those powers.

It had been contended by General Smuts that at the Peace Conference and the Washington Conference, the Dominions were represented by distinct delegations. Sir John Salmond contended that there was but a single Empire delegation, and the Inter-Imperial Relations Report seems to confirm this view (*a*).

After the Great War the famous controversy over Chanak arose. When the question was raised by Britain of preventing by force the Turks from crossing into Europe, the Premier of Canada replied that the Canadian Parliament must determine whether that country should take part in a war in which Great Britain was involved. Later, when the Treaty of Lausanne was concluded with Turkey, the Canadian Government took the ground that it would assume no responsibility for any treaty which it did not help to negotiate. The Lausanne Treaty was, therefore, never ratified by Canada.

Canada even claimed the right to make treaties by herself, without the interference of Great Britain. In 1923 the treaty regulating the halibut fisheries on the North Pacific coast was negotiated between Canada and the United States. The method of its execution was anxiously watched by the other Dominions, as it was felt to be a test case. Canada asked that it should be signed by her representative alone. This the British Ambassador at Washington, evidently acting under instructions from the Foreign Secretary, refused. The Canadian Government insisted, and finally, after obvious disagreement between the Dominion and Foreign Offices in Downing Street, the latter gave way, and the treaty bore the signature of the Canadian agent alone (*b*). The Canadian representative, however, signed the treaty under powers from the King, issued under the advice of his British Ministers; and he signed generally, that is, strictly speaking, for the whole Empire. The United States

(*a*) See the *Times*, London, July 18, 1921; Keith, *Constitution, Administration and Laws of the Empire*, p. 46.

(*b*) See Prof. Lowell's article in *Foreign Affairs*, Vol. 5, p. 382.

Senate, after much misunderstanding of the position, ratified the treaty as binding the whole Empire.

This practice of signing a treaty by the Dominion representative alone under powers issued on the advice of the King's British Ministers, was followed in 1924 in the commercial treaty negotiated between Canada and Belgium.

Once separate diplomatic representation was conceded to one Dominion, it naturally had to be conceded to all the other Dominions. Britain showed great hesitation in allowing a Dominion to sign a treaty alone, even though the powers for signing such treaty were given on the advice of the British Ministry; but her attitude in regard to the appointment of ambassadors was different. In his statement regarding the appointment of a Canadian Minister at Washington, Mr. Bonar Law stated: "It has been agreed that His Majesty, on the advice of his Canadian Ministers, shall appoint a Minister Plenipotentiary who shall take charge of Canadian affairs at Washington." It could be said that the sole responsibility for such an appointment rested with the Canadian Government. It is true that the Canadian Secretary of State did not personally advise the King, but had he been in England at the time, there is no doubt that he would have done so. As it happened, the advice to the King was by Order in Council cabled to the Secretary for the Colonies, who acted and advised the King purely as the representative, in this matter, of the Canadian Government (*c*). In 1924 the Irish Free State appointed its ambassador to the United States.

If the United States is to negotiate with Canada in the future, it should be directly with the Canadian representative, without the intervention of the British ambassador. The Canadian representative ought to inform the British ambassador, in conformity with well-established convention, whether

(*c*) The question should be considered of how the Dominion High Commissioners in London could act as the representatives of their respective Governments and have personal audience with the King in advising him on Dominion matters. The King cannot very well have his own ambassadors accredited to his own Court.

the matter of negotiation interests other parts of the Empire; but this is the Canadian representative's own concern, and not that of the United States.

The granting of powers to represent a Dominion at an international conference has now fallen into line with the practice of appointing ambassadors on the advice of a Dominion Government alone. The Report of 1926 laid down that: "The plenipotentiaries for the various British units should have full powers issued in each case by the King, on the advice of the Government concerned indicating and corresponding to the part of the Empire for which they are to sign (*d*). In 1927, at the Geneva Conference for the Limitation of Naval Armaments, South Africa had two plenipotentiaries with full powers issued by the King on the advice of his Government in the Union of South Africa. In 1928 the Governments of the Empire signed the Treaty for the Renunciation of War on their own responsibility.

Thus the Dominions have by gradual steps reached a position of absolute liberty in their foreign relations, but always honourably bound by the understanding to work, wherever possible, in conjunction with Great Britain as a united Britannic Alliance.

(*d*) The form adopted is: "His Majesty, the King of Great Britain, Ireland and the British Dominions beyond the seas, Emperor of India, in respect of the Dominion of Canada," *or* "in respect of the United Kingdom of Great Britain and Northern Ireland," *or* as the case may be. The King is King of all his possessions, but, when functioning, he acts not for an aggregation, but *in respect of* some special part or parts of his possessions.

# CONCLUSION.

No man has any right to weaken or destroy a faith which he cannot or will not replace with a loftier.—*Brinsley, Essays.*

There is the genius of progress in the British constitution; there is something in it that defies and overcomes difficulties, and, in the course of time, conducts people to a higher level of efficiency and prosperity.—*Rt. Hon. S. Sastri, Agent-General for India in South Africa, Address to Witwatersrand University,* May 28, 1928.

## CHAPTER XVIII.

### CONCLUSION.

"NATIONS," said Grattan, "are like seeds in the soil; they swell in their stated time to their destined proportion by virtue of laws which we do not make and cannot control." New Dominions with new interests and new policies will arise, claim admission to the Imperial Conference and the League of Nations. Rhodesia and Ceylon are knocking at the door. The West Indies are discussing federation. The new Colonies in Africa will grow and flourish and wield power. India, already showing an aptitude for responsible government, will become the most powerful of all the Dominions. The ancient civilisation is awakening; and the power of India, of a nation of great intellect, great culture and great wealth, despite the fears of the old school of politicians, must in the long run add to the power of the British Commonwealth, to its prosperity and its happiness. Thus, the subjects of the Crown will go on prospering and multiplying, and wield, it is to be hoped, an influence for good and not for evil in the world.

The great problem for Empire statesmen will be to keep the Empire together and maintain its co-operation and unity. It is idle to imagine that there are no perils within the Empire endangering that unity and co-operation. Whatever idealists may say, it is not sentiment so much as reciprocal advantage in its more material aspects that must form the basis of co-operation and unity. Should the economic policy of any Britannic State offer no advantage, or rather, be injurious, to the other Britannic States; should there be isolated action in declaring war or peace, or in foreign policy generally; should there be any attempt on the part of one State in the Empire to exercise force or compulsion towards any other State in

the Empire; should racial antagonisms play a part in the administration or policy of any Dominion; above all, should the spirit of inter-Imperial friendliness and goodwill ever cease by reason of too constant bickerings and misunderstandings, the cohesion will be loosened "and everything will hasten to decay and dissolution."

It is difficult to see how the free trade economic policy of Great Britain can offer any advantage to the Dominions. It is no argument to say that England is an open market for Dominion products. Were there a tariff, would Britain discriminate adversely against Dominion products? In general, it can be said that the British market is as open to the rest of the world as it is to the Dominions. On the other hand, every Dominion gives a valuable and substantial preference to British manufactures. They get nothing tangible in return (*a*). Unless Britain adopts a tariff granting the Dominions preference on their products, they will continue to get nothing in return. There is a rampant, unmitigated, universal flourishing of tariffs in the world; the economic scholarship of nations refuses to accept the British practice as wisdom. All foreign nations have either a protective or a negotiatory tariff. As long as Britain has neither, she must not be surprised if the Dominions enter into commercial treaties with countries outside the Empire. It is a natural and logical consequence of the absence of a negotiatory tariff in Great Britain. It leads to loss of trade to Britain, for there is a tendency on the part of the Dominions to place their orders for manufactured articles in countries which buy their raw materials from them. Treaties are made with such conditions. For this reason Britain has now ceased to be the best customer of some of the Dominions. This inveterate and obstinate free trade policy on the part of Britain is fraught with much danger to the maintenance of the Empire, for the foreign trade treaties of the

(*a*) The work of the Empire Marketing Board, admittedly of tremendous value to the Dominions, has this disadvantage, namely, that the people in the Dominions do not know what it is doing, nor can they see, as would be the case in preferenees, any direct substantial advantages.

Dominions give rise to criticism and ill-will, and thus destroy the harmony and goodwill of inter-Imperial relations (*b*).

In foreign policy there is the most perfect co-operation between Britain and the Dominions. There is no fault to find and no criticism to make. It is impossible to contemplate the neutrality of a Britannic State in a dangerous war in which other Britannic States are involved.

It is also impossible to imagine the exercise of force by Britain towards any Dominion or Colony, or of one Dominion towards another. "Whether they are right or whether they are wrong—more, perhaps, when they are wrong than when they are right—they cannot be made amenable by force; mutual good feeling, community of interest, and abstention from pressing rightful claims to their logical conclusion, can alone hold together the Empire" (*c*).

There is great danger in racial antagonisms. This is only to be expected in an Empire of so many different races, where so many tongues are spoken and so many varying customs abound. The Hindoo and the Mahommedan, the Indian and the South African, the Cape Coloured and the Negro, the Canadian and the Chinaman, may not see eye to eye. The problem is a delicate one, especially in regard to immigration. But it must be faced from two points of view; from the view that immigration falls within the rule that it is the undisputed right of every Dominion to decide for itself the composition of its own citizens; and from the view that once a person is born in a country, he should be able to exercise the full rights of citizenship in that country. For immigration may be a matter of choice; but birth is misfortune enough without the hardship of differentiation of political rights and of economic liberties.

There are eight real bonds which hold the Empire together.

(*b*) Politicians in England in tariff controversies use the slogan, "Your food will cost you more"; but they will soon find out that if Dominion contracts keep on going to other countries, the worker will have no wherewithal to buy any food. The price of food and the means to buy food, *i.e.*, wages, are relative terms.

(*c*) Sir C. P. Lucas.

The King is the strongest. "The King is a more prominent link between the United Kingdom and each British possession than Parliament is. In every British possession the Crown has the supreme executive power. The Governor is appointed by the Crown; and all administrative and judicial acts are done in the name of the King (or of his representative, the Governor), and done on the advice of the local ministry and not of the British Cabinet." These are the words of a great authority (*d*) on Imperial constitutional questions. They correctly express the legal position. But they also express the political situation and the popular conception.

Professor Kenny, in a striking passage (*e*), declares that to most persons the sense of loyalty to a living person is stronger than even the attachment to historical or political ideas. The heterogeneous and fragile Austrian Empire was held together throughout its last sixty years, in spite of centrifugal tendencies, by the personal popularity of the Emperor. In 1887, the celebration of Queen Victoria's Jubilee was attended not only by foreign princes and sovereigns, but also by representatives of all portions of the British Empire. The presence of the latter stimulated the popular enthusiasm and aroused continuous acclamation. It marked the beginning of a new Imperialism which lasted for forty years. The sentiment of loyalty to the Sovereign became a rational idea; it was a feeling which placed the relation of Britain and the Dominions in a new light. This new Imperialism was brought about not by argumentative reasonings, but by the spell of a living personality. Queen Victoria had completed fifty years of punctual discharge of all her public and her private duties. The realisation of what her people owed to such a Sovereign inspired an outburst of loyalty that far surpassed any enthusiasm that any Sovereign of a democratic people had ever aroused. Throughout the Dominions it had come to be realised that she was not only the symbol of Empire, but also its chief bond (*f*). Succeeding Monarchs

(*d*) Jenkyns, *British Rule and Jurisdiction beyond the Seas*, p. 12.
(*e*) 2 *Cambridge Law Journal*, 1926, p. 157.
(*f*) Kenny, 2 *Cambridge Law Journal*, 1926, p. 157.

upheld the great tradition. There was nothing more touching, more inspiring, than the grief of a whole Empire in the long illness of King George V. From all classes, from all climes, from all religions, from every section of that vast community of Empire came sincere messages of sympathy and fervid expressions of hope. Nothing like it in the history of the world has ever been known.

The Empire's chief bond, then, is the legal bond of allegiance to a common Crown and loyalty to a common King. Its second bond is the spirit of the English constitution. Throughout the Empire there is a unity and similarity of political institutions based on the ancient institutions of England, and introduced into the Dominions by statute and constitutional practice. These institutions permit of the greatest amount of political liberty; they will never be abandoned, for they have become an integral part of the national character in every Dominion. They are part of the spirit which pervades them, and together they form a powerful tie between the Britannic States.

Thirdly, the fact of the Anglo-Saxon race forming so large and influential a part of those Dominions and Colonies which were originally inhabited by other races creates a bond of much importance. The original inhabitants have come to understand the Britisher and to know his qualities, good and bad. As an official he has been efficient; as a trader, fair, with good commodities for sale and barter; as a lawyer, honest; as a diplomat, astute; as a citizen, peaceful and public-spirited. The inhabitants of the Dominions and India have learned much from him, while he has not been slow to see and learn their good qualities.

The fourth great influence for unity is that of language. The English language is the common medium of communication throughout the Empire. In India vast millions have no common tongue but that of England, and the same will one day apply to the native races of British Africa. The necessity for a knowledge of this common tongue has permeated the peoples of the Empire with the literature, the ideals, the traditions and the history of the British race; a literature that cannot but elevate, a tradition that cannot, taken all in all, but be admired.

The fifth bond of Empire springs from the fourth. It is unity of historical connection. In all the Dominions save South Africa it has been an honourable history for all the races. In South Africa there has been unnecessary conflict, bitterness and misery. It would have been better if there had not been. But subsequent events have soothed the wounds; to-morrow they will be gone; and we will join in the common march in the history of an Empire which has been the history of the modern world.

The sixth bond is one of sympathy. It is more of a sentimental bond than the others, but it is the sentiment that springs from material things. If there is a feeling that Britain has generally been fair in her treatment of small nations, the Dominions share in the pride that such a feeling must evoke. If from Britain as a conqueror or ruling Power all the races of the Empire have received an equal and just treatment, to Britain now those races which inhabit the Dominions turn in friendship and gratitude. As a moderating and mediatorial Power, Britain has shown a wisdom and a diplomatic dexterity which has never been excelled. Her Colonial policy has inspired confidence. Her general international rectitude has given birth to sympathy. That sympathy has permeated from the great things to the small. If it is easy to sympathise with those who fought on your side in great wars, who speak the same language as you speak, and read the same literature and acknowledge the same King, it is easy also to befriend those men and women who annually partake in friendly rivalry with you in all the great sporting games of the Empire, who read your newspapers and think on very much the same lines as you think. "These are ties which, though light as air, yet are strong as the links of iron."

The seventh great bond is the British navy. There is a feeling in all the Dominions that the navy protects the shores of the whole Empire from attack by foreign invaders, and the trade of the whole Empire from interference by foreign Powers. The Dominions, through their small contributions to the maintenance of the navy, feel they have a kind of proprietary interest

in it (*g*). That feeling of interest is maintained by constant propaganda, and by the dissemination, unconscious though all this may be, of words, and phrases, and news, and thoughts connected with the navy. It is a bond of security; it is part of the eighth great bond of Empire, perhaps the greatest of all.

The British Empire is an organisation which secures permanent peace among one-quarter of the world's inhabitants. Invasion, which would not be improbable were the various States of the Empire to stand alone, by their unity and cohesion is rendered impossible. Never within the Empire, except in the case of the American Colonies, and in the case of Ireland, has one part raised arms against another. The causes which gave rise to the exceptions have now been removed. The very constitution of the Empire, its spirit and outlook, render forever improbable the calamity of internal strife. This is the one great justification for the existence of the Empire, for the wrongs that have been perpetrated in its name, for the sacrifices and suffering incurred in its maintenance. It is the one great justification in the belief of the Empire's future. While co-operation and goodwill are maintained, and they will certainly grow stronger and stronger, a resort to arms between the Britannic States is impossible.

In this co-operation there is also an example to the other nations of the world. Alliances for the preservation of peace must be sought among those who have common ties and common sympathies, for they render co-operation easier by reason of the goodwill always attached to sympathy. Sympathy nourishes understanding. Between no two mighty combinations of States do there exist so many ties of sympathy as between the British Commonwealth and the United States of America. In their veins the same blood, on their tongues the same noble language, in their great hearts the same impulses of liberty

(*g*) The contributions may be in the form of cash payments, or in constructing a naval base or providing for its land defence, or carrying out a survey of local waters. All this has been done in South Africa, as well as forming a mine-sweeping section. Australia has presented a battleship. South Africa spent £328,450 on Simonstown for Britain.

and progress and enlightenment, no two States have been more happily situated for an alliance of peace. The British Empire turns unconsciously towards, and extends the hand of friendship to, the United States of America. In the past the world has turned often enough and vainly enough to the great Republic of the West; so often has it turned, and not always in vain, to the British Empire. The one, even though it was because her world-wide interests necessitated peace, has always endeavoured to act the part of a moderating and mediatorial Power. She has held sacred the obligations of international treaties and of natural justice. Her conquests have been justified in the subsequent prosperity of the subject peoples. If trade followed the flag, science followed hard on its heels to aid in the amelioration of disease, the draining of swamps, the education of savages, and the introduction of law and order. In the judgment of posterity the territorial expansion of the British Empire is a policy that cannot be condemned. In what other nation has there been an equal championship of the cause of the oppressed and the suffering than among the British? These are the things which proclaim the greatness of nations, and strengthens one's faith in the destiny of mankind.

Of similar instincts, but concentrated into a narrower space, the United States of America has, instead of expanding outwards like her trade, allowed her international political morality to be drawn inwards. In no nation so cosmopolitan in its composition has a political philosophy so parochial ever been known. The fear of international entanglement was an obsession that coloured the thoughts of a whole nation with prejudices against all the European Powers. Especially against the very Power most suited to an alliance with her, most desirous of her friendship, and most generous in her goodwill towards her, she has shown minor forms of hostility and caprice. Happily this feature of American politics is disappearing. Uncle Sam has shown an inclination to unbend. An alliance with the British Commonwealth is now a matter of practical politics. Should such an alliance be consummated the cause of world peace must be assured. As members of the League of Nations

the United States and the British Commonwealth must wield a power and an influence that would change the whole course of civilisation. In a world of darkness, and intolerance and prejudice, the British Empire even now proceeds like a torch-bearer, ever advancing, elevating, instructing. But the Recording Angel leans thoughtfully over *America's* pages in the book of National Destinies and suspends his pen.

# APPENDICES.

I. APPEALS TO THE PRIVY COUNCIL.

II. MANDATES.

III. INTER-IMPERIAL RELATIONS REPORT, 1926.

# APPENDIX I.

## APPEALS TO THE PRIVY COUNCIL.

The practice of invoking the exercise of the Royal prerogative by way of appeal from any Court in His Majesty's Dominions has long obtained throughout the British Empire. In its origin it may have been no more than a petitory appeal to the Sovereign as the fountain of justice for protection against an unjust administration of the law; but the practice has long since ripened into a privilege belonging to every subject of the King. It has been recognised and regulated in a series of Imperial statutes (*a*). Any law by a Dominion Parliament, in so far as it intends to prevent the King from giving effective leave to appeal against an order of a Dominion Court, is repugnant to the Imperial statutes regulating such right of appeal, and is therefore void and inoperative by virtue of the Colonial Laws Validity Act, 1865. Nor can the Royal assent give validity to such an enactment, for it has been rendered void *ab initio* by an Imperial statute (*b*).

This appellate jurisdiction of the Crown is inherent and inseparable from it, and cannot be negatived by a grant of sovereignty containing no reservation of the right. But this right is subject to the restrictions imposed by statute or Order in Council and to rules of practice. But even where the right is so restricted, the Crown in all cases enjoys the prerogative right of granting special leave to appeal, unless such right is negatived by express words in an Act of the Imperial Parliament (*c*).

While the Colonial Laws Validity Act remains in force, this must always be the legal position. It is true that the decision of the Privy Council can be rendered valueless by legislation in a

(*a*) *E.g.*, Judicial Committee Acts of 1833 and 1844.
(*b*) *Nadan* v. *The King* (1926), Appeal Cases, p. 491.
(*c*) *Cushing* v. *Dupuy* (1880), 5 Appeal Cases, p. 409.

Dominion Parliament either changing the law for the future or retrospectively. But this has seldom been done. In South Africa, there can be no appeal as of right, but special leave must be obtained from the Privy Council. Consequently very few appeals are heard from the Appellate Division of the Supreme Court of South Africa. India and Canada supply most of the appeals to the Privy Council. In Ireland appeals in constitutional matters cannot be taken away by Irish legislation. It is the obvious safeguard of the supremacy of the Treaty of 1921 over all Irish constitutional matters, for the right of appeal is provided for in the Treaty. Similarly, in Canada, Quebec considers the final voice of the Privy Council as the best safeguard for her provincial rights, her language and her religion. It may seem that autonomy is inconsistent with compulsory appeals, but this is not so if it is remembered that the appeal to the Privy Council is considered necessary for the protection of the rights won by minorities in certain Dominions; and it is a right, not imposed by the Imperial Parliament, but desired by the Dominions (*d*).

There are certain objections to the right of appeal out of a country. Firstly, the ends of justice might be defeated by the enormous cost of such an appeal. Secondly, the Court, especially when counsel arguing the case are not from the country of the origin of the appeal, may not have a sound knowledge of the local circumstances. Thirdly, where a dispute arises between parties, which becomes in fact a dispute between a Dominion Government and the Imperial Government, it does not seem fair (though it in fact always is) that a Court, composed of members of the one country, should adjudicate on those differences.

But these doubts are not very formidable; and strong reasons exist for the development of the Judicial Committee of the Privy Council into a perfect international court within the Empire. It should be composed of representatives from each Dominion, who, sitting together, will settle and regulate not only inter-Imperial differences on the interpretation of laws and treaties, but also internal differences between private parties. Thus the Judicial Committee, continuing the work it is doing at present, would give every subject of the Crown throughout the Empire, who considers himself wronged by a decision of a Court of law, a right to appeal from such a decision if his grievance is well-founded.

(*d*) See also Nathan, *Empire Government*, p. 56.

# APPENDIX II.

## MANDATES.

The doctrine of the territorial limitation to Dominion legislation receives no support from a consideration of the question of mandates. When the Great War came to an end it was not possible, on account of the many statements of idealism as to a peace of justice, to carry out an open policy of annexation as established by war-time arrangements. The mandatory system is thus a new contrivance for ordinary annexation. With such a basis constituting mandates, a mandatory Power must necessarily have complete sovereignty over the mandated territories. So much so is this the case, that the territory of South-West Africa has now rapidly approached the position when it can be regarded as one of the constituent provinces of the Union of South Africa. The South African Courts have held that in consequence of the intimate relations existing in law between the Union and South-West Africa by virtue of the mandate, a conviction in the High Court of South-West Africa in respect of a matter which is also a criminal one in the Union, cannot be disregarded by the other South African Courts, and such a conviction cannot be treated as a foreign judgment (*a*). In 1919, the Union Parliament gave the Governor-General full power to make appointments, establish offices, and issue proclamations repealing, altering or amending the laws in force in South-West Africa (*b*). The territory of South-West Africa was therefore placed in the first stage of government, namely, under the complete control of an external Power, and its form of government closely resembled Crown Colony government. In 1925, the territory was granted a constitution,

(*a*) *Cape Law Society* v. *Van Aardt* (1926), Cape Provincial Division Reports, p. 312.

(*b*) Act No. 49 of 1919 (Union of South Africa).

which was a compromise between the constitution of the Senate of the Union and of the Provincial Councils (*c*). The Legislative Assembly, consisting of six members appointed by the administrator and twelve directly chosen by the electorate, must take the oath of allegiance to the King as holding, on behalf of the Government of the Union, the mandate for the territory of South-West Africa. The Union Parliament retains its full power to make laws for the territory as an integral portion of the Union. The Appellate Division of the Supreme Court of South Africa is the Court of Appeal from the High Court of South-West Africa in the same circumstances and subject to the same conditions as it is the Court of Appeal from a Provincial Division of the Supreme Court of South Africa (*d*). The Government of the Union is thus the sovereign of the territory of South-West Africa, and it is clear, from the attitude of the Government and people of South Africa, that the territory is and will always remain an integral portion of the Union. The claims of the Union of South Africa seem unanswerable (*e*).

By Article 119 of the Treaty of Versailles, Germany renounced in favour of the Principal Allied and Associated Powers—that is, in favour of the United States, the British Empire, France, Italy and Japan—all rights and titles over her overseas possessions, in order that all necessary steps might be taken for their administration on a mandatory basis, the general principles of which were enumerated by Article 22 of the Covenant of the League of Nations.

Article 22 lays down certain principles applicable to territories inhabited by peoples not as yet able to stand by themselves, who have ceased to be under the sovereignty of the States which formerly governed them. Their well-being and development form a sacred trust of civilisation. Practical effect is given to these principles by entrusting the tutelage of such peoples to advanced nations who are in a position to undertake the responsibility; such tutelage to be exercised by them as mandatories on behalf of the League. "There are territories," Article 22 provides, "such as South-West Africa . . . which, owing to the sparseness of their

(*c*) Act No. 42 of 1925 (Union of South Africa).

(*d*) Act No. 12 of 1920 (*ibid.*).

(*e*) See the judgment of the Appellate Division in the case of *Rex* v. *Christian* (1924), p. 101, on which the author's argument is based.

population . . . or their geographical contiguity to the territory of the mandatory and other circumstances, can be best administered under the laws of the mandatory as integral portions of its territory, subject to the safeguards above mentioned." The safeguards referred to relate to the prohibition of the slave trade, the traffic in arms and liquor, and the training of natives for other than defensive and public purposes. The degree of authority, control, or administration to be exercised by the mandatory is to be defined by the Council, and the mandatory is to make an annual report to the Council "in reference to the territory committed to its charge," which report is to be examined by a Permanent Commission constituted to advise the Council on all matters relating to the observance of the mandate.

The mandate for South-West Africa recites that the Principal Allied and Associated Powers have agreed that a mandate shall be conferred on His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer the territory, and that His Majesty, on behalf of the said Government, has agreed to accept the mandate and to exercise it, on behalf of the League of Nations, in accordance with its provisions. It gives the mandatory full power of administration and legislation over the territory as an integral portion of the Union, and authorises him to apply the laws of the Union (*f*), subject to such local modifications as circumstances may require. The mandatory shall promote to the utmost the material and moral well-being and the social progress of the territory. The annual report is required by the mandate to be to the satisfaction of the Council, and to indicate the measures taken to carry out the obligations assumed by the mandatory. Finally, the consent of the Council is required for any modification of the terms of the mandate; and any dispute between the mandatory and another member of the League relating to the interpretation or application of the mandate, failing settlement by negotiation, is to be submitted to the Permanent Court of International Justice.

(*f*) This is a departure from the confirmed British practice of allowing conquered or ceded territories to continue the law which was in force prior to the conquest or cession. As it happens in this case the departure is not one of His Majesty's, but of the League of Nations, the principle of continental law, and not of British custom, having prevailed. The population of South-West Africa being so small, with little likelihood of a body of German law being developed, the innovation is a very wise one.

The mandate over South-West Africa is not similar to that over Iraq, Palestine or other territories formerly Turkish. The latter, it was contemplated, would in time be able to stand alone, and the temporary mandatory was to act with that consummation in view (*g*). But this condition is not contemplated in regard to the sparsely-populated territories mentioned in Article 22 of the Covenant of the League of Nations.

In reality, the introduction of a system of mandates by the League of Nations is not a quite new notion. There is, for instance, the case of the Belgian Congo; and the practice of granting corporate bodies a charter, conferring on them authority to govern and administer certain territories in Asia, Africa or elsewhere, is well known (*h*). There are, no doubt, important differences between protectorates and colonies and between both of these and a territory mandated by the Council of the League. But between all there is this essential agreement: the grant or charter to the corporate body, the commission to the Governor, like the mandate, is but a written instrument conferring authority to execute powers of government and administration in the territory to which it relates; and it carries with it and creates rights and obligations (*i*).

When, by the Treaty of Versailles, Germany renounced all right to the territory known as South-West Africa, there was no longer any German sovereignty in that territory. Some other sovereignty must have replaced the German sovereignty. This sovereignty could be only either the Associated Powers of the Treaty of Versailles, or the League of Nations, or the Union of South Africa.

The Associated Powers do not constitute a State or a sovereign Power. They are merely certain sovereign States which have mutually agreed to recognise certain political conditions created by the Treaty of Versailles. They have no combined sovereign power, and no person can owe them, as a collective body, allegiance. There is no sovereignty in independent States bound together by Treaty (*k*).

(*g*) Iraq, in December, 1927, by Treaty with Britain, became an independent State.

(*h*) *E.g.*, British East India Company, Dutch East and West India Companies, British South Africa Company. Compare also the Commission issued to Colonial Governors.

(*i*) Per Kotzé, J.A., in *Rex* v. *Christian* (1924) A. D., p. 129.

(*k*) Per Wessels, J.A., *ibid.* p. 136.

It has been shown (*l*) also that the League of Nations is not a State; but it nevertheless has a *persona* and rights and duties. Whether these rights include allegiance and the right of sovereignty need not be considered, because, so far as the government of the mandated territory of South-West Africa is concerned, the League can neither prescribe nor dictate to the mandatory in regard to the framing, making and repealing of the laws which are to apply to the territory. It cannot give directions to the mandatory in respect of the establishment of judicial tribunals and the administration of justice, nor in respect of the appointment of officials, the raising and spending of revenue, and the like. Subject, therefore, to the restrictions imposed, the mandatory has full right and power over the mandated territory (*m*).

The term *mandatory Power* may seem to imply that the mandatory acts as the agent of the Associated Powers or of the League of Nations; but neither by the Treaty of Versailles nor by the mandate of the League of Nations has the Union of South Africa been appointed as a mere agent. The Associated Powers, through the League of Nations, have, by treaty between themselves, entrusted the complete government of South-West Africa to His Britannic Majesty through the Union of South Africa. The Union of South Africa determines by what laws South-West Africa is to be governed and how these laws are to be enforced. Once having elected to hand over South-West Africa to the Union, the League of Nations has no power to dictate how that territory is to be governed. The fact that the mandatory is required to report to the League what its political action is in the mandated territory, makes no difference. It is a mere treaty obligation, which does not affect the Union's rights and powers (*n*).

The full power of administration and legislation over the territory is therefore vested in the Union of South Africa, and there is no other Power in the world, not even Great Britain, which can enforce law there. For Britain is one of the Powers that has agreed that the Union shall be the mandatory Power, and as regards South-West Africa, she stands in the same relation to the Union as any other Power. The plenary authority granted to the

(*l*) Chapter VIII.
(*m*) Per Kotzé, J.A., *ibid.* p. 132.
(*n*) Per Wessels, J.A., *ibid.* p. 137.

Union to make laws and enforce them covers the whole sphere of government.

The international status of the Union is in every way consistent with the possession of sovereignty in the capacity of a mandatory. For the Union is not only a signatory to the Treaty, but is a member of the League of Nations, and, as such, an independent unit of the Assembly (*o*). The Union is on a footing of equality, for the purposes of the mandate, with all other members of the League, and is not of itself subject in any respect to any other member. It is subject only to the will of its own people (*p*).

Though South-West Africa may not have been transferred to the people of the Union, so much by way of absolute property as by way of a trustee in possession of the property of a *cestui que trust* or a guardian of the property of his ward (*p*), yet the people of the Union regard it as the property of the Union, that is, as a province of the Union. In law, it is an integral portion of the Union. As the mandate is clearly irrevocable, and the League of Nations has no power to deprive the Union of its authority over South-West Africa, it may be assumed that South-West Africa is now annexed to the Union and forms portion of the Union. It will, in time, send its representatives to the Union Legislative Assembly, and there will then be no difference between South-West Africa and the Transvaal as constituent provinces of the Union. The Union Government could even now refuse to make reports to the League of Nations concerning its administration of the territory, as there is no machinery to compel the rendering of such reports; but the Government will not follow such course. The obligation to render reports will be remitted by the League in time to come, on request by the Union Government, when South-West Africa has its own representatives in the Parliament of the Union.

(*o*) Per Innes, C.J., *ibid.* p. 112.
(*p*) Per de Villiers, J.A., *ibid.* p. 121.

# APPENDIX III.

## INTER-IMPERIAL RELATIONS REPORT, 1926.

The members of the Committee on Inter-Imperial Relations, in addition to Lord Balfour, included the Prime Ministers of Canada, the Commonwealth of Australia, New Zealand, the Union of South Africa and Newfoundland, the Vice-President of the Executive Council of the Irish Free State, the Secretary of State for India as head of the Indian Delegation, the Secretary of State for Foreign Affairs, and the Secretary of State for Dominion Affairs. Other Ministers and members of the Imperial Conference attended particular meetings.

The text of the report is as follows:—

### I.—Introduction.

We were appointed at the meeting of the Imperial Conference on October 25, 1926, to investigate all the questions on the agenda affecting inter-Imperial relations. Our discussions on these questions have been long and intricate. We found, on examination, that they involved consideration of fundamental principles affecting the relations of the various parts of the British Empire *inter se*, as well as the relations of each part to foreign countries. For such examination the time at our disposal has been all too short. Yet we hope that we may have laid a foundation on which subsequent Conferences may build.

### II.—Status of Great Britain and the Dominions.

The committee are of opinion that nothing would be gained by attempting to lay down a Constitution for the British Empire. Its widely scattered parts have very different characteristics, very different histories, and are at very different stages of evolution;

while, considered as a whole, it defies classification and bears no resemblance to any other political organisation which now exists or has ever yet been tried.

There is, however, one most important element in it which, from a strictly constitutional point of view, has now, as regards all vital matters, reached its full development—we refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relation may be readily defined. *They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.*

A foreigner endeavouring to understand the true character of the British Empire by the aid of this formula alone would be tempted to think that it was devised rather to make mutual interference impossible than to make mutual co-operation easy.

Such a criticism, however, completely ignores the historic situation. The rapid evolution of the Oversea Dominions during the last fifty years has involved many complicated adjustments of old political machinery to changing conditions. The tendency towards equality of status was both right and inevitable. Geographical and other conditions made this impossible of attainment by the way of federation. The only alternative was by the way of autonomy; and along this road it has been steadily sought. Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever.

But no account, however accurate, of the negative relations in which Great Britain and the Dominions stand to each other can do more than express a portion of the truth. The British Empire is not founded upon negations. It depends essentially, if not formally, on positive ideals. Free institutions are its life-blood. Free co-operation is its instrument. Peace, security and progress are among its objects. Aspects of all these great themes have been discussed at the present Conference; excellent results have been thereby obtained. And though every Dominion is now and must always remain the sole judge of the nature and extent of its co-operation, no common cause will, in our opinion, be thereby imperilled.

Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our inter-Imperial relations. But the principles of equality and similarity, appropriate to status, do not universally extend to function. Here we require something more than immutable dogmas. For example, to deal with questions of diplomacy and questions of defence, we require also flexible machinery—machinery which can from time to time be adapted to the changing circumstances of the world. This subject also has occupied our attention. The rest of this report will show how we have endeavoured not only to state political theory but to apply it to our common needs.

See 126

### III.—Special Position of India.

It will be noted that in the previous paragraphs we have made no mention of India. Our reason for limiting their scope to Great Britain and the Dominions is that the position of India in the Empire is already defined by the Government of India Act, 1919. We would, nevertheless, recall that by Resolution IX. of the Imperial War Conference, 1917, due recognition was given to the important position held by India in the British Commonwealth. Where, in this report, we have had occasion to consider the position of India we have made particular reference to it.

### IV.—The Relations between the Various Parts of the British Empire.

Existing administrative, legislative and judicial forms are admittedly not wholly in accord with the position as described in Section II. of this report. This is inevitable, since most of these forms date back to a time well antecedent to the present stage of constitutional development. Our first task then was to examine these forms with special reference to any cases where the want of adaptation of practice to principle caused, or might be thought to cause, inconvenience in the conduct of inter-Imperial relations.

#### (a) *The Title of His Majesty the King.*

The title of His Majesty the King is of special importance and concern to all parts of His Majesty's Dominions. Twice within the last fifty years has the Royal title been altered to suit changed conditions and constitutional developments.

The present title, which is that proclaimed under the Royal Titles Act of 1901, is as follows:—

> "George V., by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India."

Some time before the Conference met it had been recognised that this form of title hardly accorded with the altered state of affairs arising from the establishment of the Irish Free State as a Dominion. It had further been ascertained that it would be in accordance with His Majesty's wishes that any recommendation for change should be submitted to him as the result of discussion at the Conference.

We are unanimously of opinion that a slight change is desirable, and we recommend that, subject to His Majesty's approval, the necessary legislative action should be taken to secure that His Majesty's title should henceforward read:—

> "George V., by the Grace of God, of Great Britain, Ireland, and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India."

(b) *Position of Governors-General.*

We proceeded to consider whether it was desirable formally to place on record a definition of the position held by the Governor-General (*a*) as His Majesty's representative in the Dominions. That position, though now generally well recognised, undoubtedly represents a development from an earlier stage when the Governor-General was appointed solely on the advice of His Majesty's Ministers in London, and acted also as their representative.

In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any department of that Government.

(*a*) The Governor of Newfoundland is in the same position as the Governor-General of a Dominion.

It seemed to us to follow that the practice whereby the Governor-General of a Dominion is the formal official channel of communication between His Majesty's Government in Great Britain and his Governments in the Dominions might be regarded as no longer wholly in accordance with the constitutional position of the Governor-General. It was thought that the recognised official channel of communication should be, in future, between Government and Government direct. The representatives of Great Britain readily recognised that the existing procedure might be open to criticism and accepted the proposed change in principle in relation to any of the Dominions which desired it. Details were left for settlement as soon as possible after the Conference had completed its work, but it was recognised by the Committee, as an essential feature of any change or development in the channels of communication, that a Governor-General should be supplied with copies of all documents of importance and in general should be kept as fully informed as is His Majesty the King in Great Britain of Cabinet business and public affairs.

(c) *Operation of Dominion Legislation.*

Our attention was also called to various points in connection with the operation of Dominion legislation, which, it was suggested, required clarification.

The particular points involved were:—

(a) The present practice under which Acts of the Dominion Parliaments are sent each year to London, and it is intimated, through the Secretary of State for Dominion Affairs, that "His Majesty will not be advised to exercise his powers of disallowance" with regard to them.

(b) The reservation of Dominion legislation, in certain circumstances, for the signification of His Majesty's pleasure which is signified on advice tendered by His Majesty's Government in Great Britain.

(c) The difference between the legislative competence of the Parliament at Westminster and of the Dominion Parliaments in that Acts passed by the latter operate, as a general rule, only within the territorial area of the Dominion concerned.

(d) The operation of legislation passed by the Parliament at Westminster in relation to the Dominions. In this connection special attention was called to such statutes as the Colonial Laws Validity Act. It was suggested that in future uniformity of legislation as between Great Britain and the Dominions could best be secured by the enactment of reciprocal Statutes based upon consultation and agreement.

We gave these matters the best consideration possible in the limited time at our disposal, but came to the conclusion that the issues involved were so complex that there would be a grave danger in attempting any immediate pronouncement other than a statement of certain principles which, in our opinion, underlie the whole question of the operation of Dominion legislation. We felt that, for the rest, it would be necessary to obtain expert guidance as a preliminary to further consideration by His Majesty's Governments in Great Britain and the Dominions.

On the questions raised with regard to disallowance and reservation of Dominion legislation, it was explained by the Irish Free State representatives that they desired to elucidate the constitutional practice in relation to Canada, since it is provided by Article 2 of the Articles of Agreement for a Treaty of 1921 that "the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada."

On this point we propose that it should be placed on record that, apart from provisions embodied in constitutions or in specific statutes expressly provided for reservation, it is recognised that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs. Consequently, it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion.

The appropriate procedure with regard to projected legislation in one of the self-governing parts of the Empire which may affect the interests of other self-governing parts is previous consultation between His Majesty's Ministers in the several parts concerned.

On the question raised with regard to the legislative competence of members of the British Commonwealth of Nations other than Great Britain, and in particular to the desirability of those members being enabled to legislate with extra-territorial effect, we think that it should similarly be placed on record that the constitutional practice is that legislation by the Parliament at Westminster applying to a Dominion would only be passed with the consent of the Dominion concerned.

As already indicated, however, we are of opinion that there are points arising out of these considerations, and in the application of these general principles, which will require detailed examination, and we accordingly recommend that steps should be taken by Great Britain and the Dominions to set up a committee with terms of reference on the following lines:—

"To inquire into, report upon, and make recommendations concerning:—

(i) existing statutory provisions requiring reservation of Dominion legislation for the assent of His Majesty or authorising the disallowance of such legislation.

(ii) (a) The present position as to the competence of Dominion Parliaments to give their legislation extra-territorial operation.

(b) The practicability and most convenient method of giving effect to the principle that each Dominion Parliament should have power to give extra-territorial operation to its legislation in all cases where such operation is ancillary to provision for the peace, order and good government of the Dominion.

(iii) The principles embodied in or underlying the Colonial Laws Validity Act, 1865, and the extent to which any provisions of that Act ought to be repealed, amended or modified in the light of the existing relations between the various members of the British Commonwealth of Nations as described in this report."

### (d) *Merchant Shipping Legislation.*

Somewhat similar considerations to those set out above governed our attitude towards a similar, though a special, question raised in relation to merchant shipping legislation. On this subject it was

pointed out that, while uniformity of administrative practice was desirable, and indeed essential, as regards the merchant shipping legislation of the various parts of the Empire, it was difficult to reconcile the application, in their present form, of certain provisions of the principal Statute relating to merchant shipping, viz., the Merchant Shipping Act of 1894, more particularly clauses 735 and 736, with the constitutional status of the several members of the British Commonwealth of Nations.

In this case also we felt that although in the evolution of the British Empire, certain inequalities had been allowed to remain as regards various questions of maritime affairs, it was essential in dealing with these inequalities to consider the practical aspects of the matter. The difficulties in the way of introducing any immediate alterations in the Merchant Shipping Code (which dealt, amongst other matters, with the registration of British ships all over the world), were fully appreciated and it was felt to be necessary, in any review of the position, to take into account such matters of general concern as the qualifications for registry as a British ship, the status of British ships in war, the work done by His Majesty's Consuls in the interest of British shipping and seamen, and the question of Naval Courts at foreign ports to deal with crimes and offences on British ships abroad.

We came finally to the conclusion that, following a precedent which had been found useful on previous occasions, the general question of merchant shipping legislation had best be remitted to a special sub-conference, which could meet most appropriately at the same time as the expert committee, to which reference is made above. We thought that this special sub-conference should be invited to advise on the following general lines:—

> "To consider and report on the principles which should govern, in the general interest, the practice and legislation relating to merchant shipping in the various parts of the Empire, having regard to the change in constitutional status and general relations which has occurred since existing laws were enacted."

We took note that the representatives of India particularly desired that India, in view of the importance of her shipping interest, should be given an opportunity of being represented at the proposed sub-conference. We felt that the full representation

of India on an equal footing with Great Britain and the Dominions would not only be welcomed, but could very properly be given, due regard being had to the special constitutional position of India as explained in Section III. of this report.

(c) *Appeals to the Judicial Committee of the Privy Council.*

Another matter which we discussed, in which a general constitutional principle was raised, concerned the conditions governing appeals from judgments in the Dominions to the Judicial Committee of the Privy Council. From these discussions it became clear that it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected. It was, however, generally recognised that where changes in the existing system were proposed which, while primarily affecting one part, raised issues in which other parts were also concerned, such changes ought only to be carried out after consultation and discussion.

So far as the work of the Committee was concerned, this general understanding expressed all that was required. The question of some immediate change in the present conditions governing appeals from the Irish Free State was not pressed in relation to the present Conference, though it was made clear that the right was reserved to bring up the matter again at the next Imperial Conference for discussion in relation to the facts of this particular case.

## V.—Relations with Foreign Countries.

From questions specially concerning the relations of the various parts of the British Empire with one another, we naturally turned to those affecting their relations with foreign countries. In the latter sphere, a beginning had been made towards making clear those relations by the resolution of the Imperial Conference of 1923 on the subject of the negotiation, signature and ratification of treaties. But it seemed desirable to examine the working of that resolution during the past three years, and also to consider whether the principles laid down with regard to treaties could not be applied with advantage in a wider sphere.

(a) *Procedure in Relation to Treaties.*

We appointed a special sub-committee under the chairmanship of the Minister of Justice of Canada (the Honourable E. Lapointe, K.C.) to consider the question of treaty procedure.

The sub-committee, on whose report the following paragraphs are based, found that the resolution of the Conference of 1923 embodied on most points useful rules for the guidance of the Governments. As they became more thoroughly understood and established, they would prove effective in practice.

Some phases of treaty procedure were examined, however, in greater detail in the light of experience in order to consider to what extent the resolution of 1923 might with advantage be supplemented.

*Negotiation.*

It was agreed in 1923 that any of the Governments of the Empire contemplating the negotiation of a treaty should give due consideration to its possible effect upon other Governments, and should take steps to inform Governments likely to be interested of its intention.

This rule should be understood as applying to any negotiations which any Government intends to conduct, so as to leave it to the other Governments to say whether they are likely to be interested.

When a Government has received information of the intention of any other Government to conduct negotiations, it is incumbent upon it to indicate its attitude with reasonable promptitude. So long as the initiating Government receives no adverse comments and so long as its policy involves no active obligations on the part of the other Governments, it may proceed on the assumption that its policy is generally acceptable. It must, however, before taking any steps which might involve the other Governments in any active obligations, obtain their definite assent.

Where by the nature of the treaty it is desirable that it should be ratified on behalf of all the Governments of the Empire, the initiating Government may assume that a Government which has had full opportunity of indicating its attitude and has made no adverse comments will concur in the ratification of the treaty. In the case of a Government that prefers not to concur in the ratification of a treaty unless it has been signed by a plenipotentiary

authorised to act on its behalf, it will advise the appointment of a plenipotentiary so to act.

*Form of Treaty.*

Some treaties begin with a list of the contracting countries and not with a list of Heads of States. In the case of treaties negotiated under the auspices of the League of Nations, adherence to the wording of the Annex to the Covenant for the purpose of describing the contracting party has led to the use in the preamble of the term "British Empire" with an enumeration of the Dominions and India if parties to the Convention but without any mention of Great Britain and Northern Ireland and the Colonies and Protectorates. These are only included by virtue of their being covered by the term "British Empire." This practice, while suggesting that the Dominions and India are not on a footing of equality with Great Britain as participants in the treaties in question, tends to obscurity and misunderstanding and is generally unsatisfactory.

As a means of overcoming this difficulty it is recommended that all treaties (other than agreements between Governments) whether negotiated under the auspices of the League or not should be made in the name of Heads of States, and if the treaty is signed on behalf of any or all of the Governments of the Empire, the treaty should be made in the name of the King as the symbol of the special relationship between the different parts of the Empire. The British units on behalf of which the treaty is signed should be grouped together in the following order: Great Britain and Northern Ireland and all parts of the British Empire which are not separate members of the League, Canada, Australia, New Zealand, South Africa, Irish Free State, India. A specimen form of treaty as recommended is attached as an appendix to the Committee's report.

In the case of a treaty applying to only one part of the Empire it should be stated to be made by the King on behalf of that part.

The making of the treaty in the name of the King as the symbol of the special relationship between the different parts of the Empire will render superfluous the inclusion of any provision that its terms must not be regarded as regulating *inter se* the rights and obligations of the various territories on behalf of which it has been

signed in the name of the King. In this connection it must be borne in mind that the question was discussed at the Arms Traffic Conference in 1925, and that the Legal Committee of that Conference laid it down that the principle to which the foregoing sentence gives expression underlies all international conventions.

In the case of some international agreements the Governments of different parts of the Empire may be willing to apply between themselves some of the provisions as an administrative measure. In this case they should state the extent to which and the terms on which such provisions are to apply. Where international agreements are to be applied between different parts of the Empire, the form of a treaty between Heads of States should be avoided.

*Full Powers.*

The plenipotentiaries for the various British units should have full powers, issued in each case by the King on the advice of the Government concerned, indicating and corresponding to the part of the Empire for which they are to sign. It will frequently be found convenient, particularly where there are some parts of the Empire on which it is not contemplated that active obligations will be imposed, but where the position of the British subjects belonging to these parts will be affected, for such Government to advise the issue of full powers on their behalf to the plenipotentiary appointed to act on behalf of the Government or Governments mainly concerned. In other cases provision might be made for accession by other parts of the Empire at a later date.

*Signature.*

In the cases where the names of countries are appended to the signatures in a treaty, the different parts of the Empire should be designated in the same manner as is proposed in regard to the list of plenipotentiaries in the preamble to the treaty. The signatures of the plenipotentiaries of the various parts of the Empire should be grouped together in the same order as is proposed above.

The signature of a treaty on behalf of a part of the Empire should cover territories for which a mandate has been given to that part of the Empire, unless the contrary is stated at the time of the signature.

*Coming into force of Multilateral Treaties.*

In general, treaties contain a ratification clause and a provision that the treaty will come into force on the deposit of a certain number of ratifications. The question has sometimes arisen in connection with treaties negotiated under the auspices of the League whether, for the purpose of making up the number of ratifications necessary to bring the treaty into force, ratifications on behalf of different parts of the Empire which are separate members of the League should be counted as separate ratifications. In order to avoid any difficulty in future, it is recommended that when it is thought necessary that a treaty should contain a clause of this character, it should take the form of a provision that the treaty should come into force when it has been ratified on behalf of so many separate members of the League.

We think that some convenient opportunity should be taken of explaining to the other members of the League the changes which it is desired to make in the form of treaties and the reasons for which they are desired. We would also recommend that the various Governments of the Empire should make it an instruction to their representatives at International Conferences to be held in future that they should use their best endeavours to secure that effect is given to the recommendations contained in the foregoing paragraphs.

(b) *Representation at International Conferences.*

We also studied, in the light of the resolution of the Imperial Conference of 1923 to which reference has already been made, the question of the representation of the different parts of the Empire at International Conferences. The conclusions which we reached may be summarised as follows:—

1. No difficulty arises as regards representation at conferences convened by or under the auspices of the League of Nations. In the case of such conferences all members of the League are invited, and if they attend are represented separately by separate delegations. Co-operation is ensured by the application of paragraph I. 1 (c) of the Treaty Resolution of 1923.

2. As regards international conferences summoned by foreign Governments, no rule of universal application can be laid down,

since the nature of the representation must, in part, depend on the form of invitation issued by the convening Government.

(a) In conferences of a technical character, it is usual and always desirable that the different parts of the Empire should (if they wish to participate) be represented separately by separate delegations, and where necessary, efforts should be made to secure invitations which will render such representation possible.

(b) Conferences of a political character called by a foreign Government must be considered on the special circumstances of each individual case.

It is for each part of the Empire to decide whether its particular interests are so involved, especially having regard to the active obligations likely to be imposed by any resulting treaty, that it desires to be represented at the Conference, or whether it is content to leave the negotiation in the hands of the part or parts of the Empire more directly concerned, and to accept the result.

If a Government desires to participate in the conclusion of a treaty, the method by which representation will be secured is a matter to be arranged with the other Governments of the Empire in the light of the invitation which has been received.

Where more than one part of the Empire desires to be represented, three methods of representation are possible:—

(i) By means of a common plenipotentiary or plenipotentiaries, the issue of full powers to whom should be on the advice of all parts of the Empire participating.

(ii) By a single British Empire delegation composed of separate representatives of such parts of the Empire as are participating in the Conference. This was the form of representation employed at the Washington Disarmament Conference of 1921.

(iii) By separate delegations representing each part of the Empire participating in the Conference. If, as a result of consultation, this third method is desired, an effort must be made to ensure that the form of invitation from the convening Government will make this method of representation possible.

Certain non-technical treaties should, from their nature, be concluded in a form which will render them binding upon all parts

of the Empire, and for this purpose should be ratified with the concurrence of all the Governments. It is for each Government to decide to what extent its concurrence in the ratification will be facilitated by its participation in the conclusion of the treaty, as, for instance, by the appointment of a common plenipotentiary. Any question as to whether the nature of the treaty is such that its ratification should be concurred in by all parts of the Empire is a matter for discussion and agreement between the Governments.

(c) *General Conduct of Foreign Policy.*

We went on to examine the possibility of applying the principles underlying the Treaty Resolution of the 1923 Conference to matters arising in the conduct of foreign affairs generally. It was frankly recognised that in this sphere, as in the sphere of defence, the major share of responsibility rests now, and must for some time continue to rest, with His Majesty's Government in Great Britain. Nevertheless, practically all the Dominions are engaged to some extent, and some to a considerable extent, in the conduct of foreign relations, particularly those with foreign countries on their borders. A particular instance of this is the growing work in connection with the relations between Canada and the United States of America which has led to the necessity for the appointment of a Minister Plenipotentiary to represent the Canadian Government in Washington. We felt that the governing consideration underlying all discussions of this problem must be that neither Great Britain nor the Dominions could be committed to the acceptance of active obligations except with the definite assent of their own Governments. In the light of this governing consideration, the Committee agreed that the general principle expressed in relation to treaty negotiations in Section V. (a) of this report, which is indeed already to a large extent in force, might usefully be adopted as a guide by the Governments concerned in future in all negotiations affecting foreign relations falling within their respective spheres.

(d) *Issue of Exequaturs to Foreign Consuls in the Dominions.*

A question was raised with regard to the practice regarding the issue of exequaturs to Consuls in the Dominions. The

general practice hitherto, in the case of all appointments of Consuls de Carrière in any part of the British Empire, has been that the foreign Government concerned notifies His Majesty's Government in Great Britain through the diplomatic channel, of the proposed appointment, and that, provided that it is clear that the person concerned is, in fact, a Consul de Carrière, steps have been taken, without further formality, for the issue of His Majesty's exequatur. In the case of Consuls other than those de Carrière, it has been customary for some time past to consult the Dominion Government concerned before the issue of the exequatur.

The Secretary of State for Foreign Affairs informed us that His Majesty's Government in Great Britain accepted the suggestion that in future any application by a foreign Government for the issue of an exequatur to any person who was to act as Consul in a Dominion should be referred to the Dominion Government concerned for consideration, and that, if the Dominion Government agreed to the issue of the exequatur, it would be sent to them for counter-signature by a Dominion Minister. Instructions to this effect had indeed already been given.

(e) *Channel of Communication between Dominion Governments and Foreign Governments.*

We took note of a development of special interest which had occurred since the Imperial Conference last met, viz., the appointment of a Minister Plenipotentiary to represent the interests of the Irish Free State in Washington, which was now about to be followed by the appointment of a diplomatic representative of Canada. We felt that most fruitful results could be anticipated from the co-operation of His Majesty's representatives in the United States of America, already initiated, and now further to be developed. In cases other than those where Dominion Ministers were accredited to the Heads of Foreign States, it was agreed to be very desirable that the existing diplomatic channels should continue to be used, as between the Dominion Governments and foreign Governments, in matters of general and political concern.

VI.—System of Communication and Consultation.

Sessions of the Imperial Conference, at which the Prime Ministers of Great Britain and of the Dominions are all able to be present, cannot, from the nature of things, take place very frequently. The system of communication and consultation between Conferences becomes, therefore, of special importance. We reviewed the position now reached in this respect with special reference to the desirability of arranging that closer personal touch should be established between Great Britain and the Dominions and the Dominions *inter se*. Such contact alone can convey an impression of the atmosphere in which official correspondence is conducted. Development, in this respect, seems particularly necessary in relation to matters of major importance in foreign affairs where expedition is often essential and urgent decision necessary. A special aspect of the question of consultation which we considered was that concerning the representation of Great Britain in the Dominions. By reason of his constitutional position, as explained in Section IV. (b) of this report, the Governor-General is no longer the representative of His Majesty's Government in Great Britain. There is no one, therefore, in the Dominion capitals in a position to represent with authority the views of His Majesty's Government in Great Britain.

We summed up our conclusions in the following resolution, which is submitted for the consideration of the Conference:—

> "The Governments represented at the Imperial Conference are impressed with the desirability of developing a system of personal contact, both in London and in the Dominion capitals, to supplement the present system of inter-communication and the reciprocal supply of information on affairs requiring joint consideration. The manner in which any new system is to be worked out is a matter for consideration and settlement between His Majesty's Governments in Great Britain and the Dominions, with due regard to the circumstances of each particular part of the Empire, it being understood that any new arrangements should be supplementary to, and not in replacement of, the system of direct communication from Government to Government and the special arrangements which have been in force since 1918 for communications between Prime Ministers."

## VII.—Particular Aspects of Foreign Relations discussed by Committee.

It was found convenient that certain aspects of foreign relations on matters outstanding at the time of the Conference should be referred to us, since they could be considered in greater detail and more informally than at meetings of the full Conference.

### (a) *Compulsory Arbitration in International Disputes.*

One question which we studied was that of arbitration in international disputes, with special reference to the question of acceptance of Article 36 of the Statute of the Permanent Court of International Justice, providing for the compulsory submission of certain classes of cases to the Court. On this matter we decided to submit no resolution to the Conference, but, whilst the members of the committee were unanimous in favouring the widest possible extension of the method of arbitration for the settlement of international disputes, the feeling was that it was at present premature to accept the obligations under the article in question. A general understanding was reached that none of the Governments represented at the Imperial Conference would take any action in the direction of the acceptance of the compulsory jurisdiction of the Permanent Court without bringing up the matter for further discussion.

### (b) *Adherence of the United States of America to the Protocol establishing the Permanent Court of International Justice.*

Connected with the question last mentioned was that of adherence of the United States of America to the Protocol establishing the Permanent Court of International Justice.

The special conditions upon which the United States desired to become a party to the Protocol had been discussed at a special conference held in Geneva in September, 1926, to which all the Governments represented at the Imperial Conference had sent representatives. We ascertained that each of these Governments was in accord with the conclusions reached by the special conference and with the action which that conference recommended.

(c) *The Policy of Locarno.*

The Imperial Conference was fortunate in meeting at a time just after the ratifications of the Locarno Treaty of Mutual Guarantees had been exchanged on the entry of Germany into the League of Nations. It was therefore possible to envisage the results which the Locarno policy had achieved already, and to forecast to some extent the further results which it was hoped to secure. These were explained and discussed. It then became clear that, from the standpoint of all the Dominions and of India, there was complete approval of the manner in which the negotiations had been conducted and brought to so successful a conclusion.

Our final and unanimous conclusion was to recommend to the Conference the adoption of the following resolution:—

> "The Conference has heard with satisfaction the statement of the Secretary of State for Foreign Affairs with regard to the efforts made to ensure peace in Europe, culminating in the agreement of Locarno; and congratulates His Majesty's Government in Great Britain on its share in this successful contribution towards the promotion of the peace of the world."

Signed on behalf of the Committee on Inter-Imperial Relations,

BALFOUR.

*November* 18, 1926.

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## APPENDIX.

(See Section V. (a).)

### Specimen Form of Treaty.

The President of the United States of America, His Majesty the King of the Belgians, His Majesty the King [*here insert His Majesty's full title*], His Majesty the King of Bulgaria, etc., etc.,

Desiring .

Have resolved to conclude a treaty for that purpose and to that end have appointed as their Plenipotentiaries:

The President

His Majesty the King [*title as above*]:

| | |
|---|---|
| for Great Britain and Northern Ireland and all parts of the British Empire which are not separate Members of the League (of Nations), | *AB.* |
| for the Dominion of Canada, | *CD.* |
| for the Commonwealth of Australia, | *EF.* |
| for the Dominion of New Zealand, | *GH.* |
| for the Union of South Africa, | *IJ.* |
| for the Irish Free State, | *KL.* |
| for India, | *MN.* |

who, having communicated their full powers, found in good and due form, have agreed as follows:

In faith whereof the above-named Plenipotentiaries have signed the present Treaty.

*AB* .
*CD* .
*EF* .
*GH* .
*IJ* .
*KL* .
*MN* .

(or if the territory for which each Plenipotentiary signs is to be specified:

| | |
|---|---|
| (for Great Britain, etc.) | *AB.* |
| (for Canada) | *CD.* |
| (for Australia) | *EF.* |
| (for New Zealand) | *GH.* |
| (for South Africa) | *IJ.* |
| (for the Irish Free State) | *KL.* |
| (for India) | *MN.*) |

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